THE LAW REPORTER.

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DAY'S CONNECTICUT REPORTS.[1]

Mr. Day is unquestionably the oldest living reporter. As early as 1806, the first volume of "Day's Reports" was issued; and from that time to the present, for forty years and upwards, he has continued in the service of the public, recording and preserving the opinions of an able court. His twenty-one volumes of Reports (five of "Day's" and sixteen of "Connecticut") comprise a body of decisions on questions of common law, of equity, and of ecclesiastical and maritime law, from which may be drawn a more complete system of jurisprudence in all its departments, probably, than from the reports of the decisions of any other single court in this country, the reports of the decisions of the supreme court of the United States alone excepted. It deserves to be mentioned, that the preparation of this series of reports constitutes by no means the whole, perhaps not the larger part, of the obligation conferred by Mr. Day's industry upon the profession of the law. Editions of Coke upon Littleton, Comyn's Digest, Bosanquet and Puller's Reports, and East's Reports, and other standard books, with very full and learned annotations, were presented from time

[1] Reports of Cases Argued and Determined in the Supreme Court of Errors of the State of Connecticut, prepared and published in pursuance of a Statute Law of the State. By Thomas Day. Vol. 16. Hartford, 1846.

to time by Mr. Day to the American bar, at a period, too, when such undertakings were more laborious, more hazardous, and more highly to be prized, than now. He has also published a well-arranged digested index to all the reports of Connecticut down to and including, the twelfth volume.

The present volume seems to be prepared with his usual care and accuracy. It will, by many, be esteemed a convenience, that in his marginal or head notes to cases he gives a pretty full abstract of the facts on which the decision turns, while at the same time he extracts and enunciates with sufficient neatness and brevity the general principle which is established by the decision. Every lawyer knows how unsafe it is, in the investigation of causes, to rely upon the statement of the principle of a decision as given in the marginal note, without looking into the facts in reference to which the decision is made. If these are abstracted and condensed in a reliable manner in the marginal note, he is saved much time and trouble, which otherwise he must bestow in going over and sifting the details of a case, in ascertaining whether it bears upon the question before him or not.

Of the decisions reported in this volume a few are noticeable. The calmness, the *sang froid*, resulting no doubt from clear convictions, with which the court, in the case of *The Hartford Bridge Company* v. *East Hartford*, p. 150, set aside an act of the legislature as unconstitutional, seem at first, in these times of legislative supremacy and popular dictation, a little unusual and remarkable. But if the law was void, it was perhaps quite as well to "say so and no more," as to make a parade of diffidence about annulling an act of a coequal branch of the government. In the case of *Calkins* v. *Lockwood*, p. 276, a new principle, it would seem, is attempted to be introduced into the common law, namely, that a contract for a mortgage or lien on property not in existence at the time of the making of the contract, but to be acquired and created afterwards, is valid, and binds the property when acquired, not only against the mortgagor but against creditors and subsequent purchasers. The case was of a contract by the lessee of a furnace for the manufacture of iron, that the lessor should have a lien on all the iron made or to be made at the furnace; and the question arose between the assignee of the lessor and attaching creditors of the lessee, with reference to iron manufactured subsequently to the making of the contract. The court rely in their opinion on the case of *Macomber* v. *Parker*, (13 Pick. R. 175,) and unluckily have misapprehended the point decided in that case. The decision was, that the contract and the facts of that case constituted a partner-

ship between the contracting parties, one of whom had sold his interest to the other outright, and the question of lien, or mortgage, or sale of future acquisitions, did not arise. In subsequent proceedings in the same case of *Macomber* v. *Parker*, (14 Pick. 497,) certain authorities were cited by the learned judge who gave the opinion of the court, tending to show that there may be an agreement for a pledge *in futuro*, which when executed would bind the property; and this doctrine is improved in the marginal note to the confusion of courts and lawyers. The supreme court of Maine, in *Abbott* v. *Goodwin*, (20 Maine R. 408,) fell into the same error, but recovered itself in *Goodenow* v. *Dunn*, (21 Maine R. 86,) and explained in a lucid manner the true principle of the decision in *Macomber* v. *Parker*. It would not be surprising if the majority of the court in Connecticut should hereafter find reasons for coming over to the opinion of their dissenting brother in that case. The very recent cases of *Lunn* v. *Thornton*, (1 Mann. Gr. & Scott, 379,) in England, and *Jones* v. *Richardson*, (9 Law Reporter, 344,) in Massachusetts, where all the authorities are reviewed, have placed this question in a light in which, probably, it will cease to vex the profession.

The case of *Ward* v. *The Griswoldville Manufacturing Company*, p. 593, presents an interesting and important principle. The act of the legislature incorporating a manufacturing company provided that the capital should not exceed fifty thousand dollars, and that a share of the stock should be one hundred dollars. After the stockholders had paid forty per cent. on their subscriptions the corporation became insolvent. On a bill in equity, brought by certain creditors of the corporation, for the benefit of all, against the stockholders, praying that they might be compelled to pay in the remaining sixty per cent. or so much thereof as should be necessary to pay the debts of the company, it was held, that the stockholders, by their subscription, assumed an obligation to the amount of one hundred dollars on each share when assessed; that when assessments became necessary to meet the debts of the corporation it was the duty of the directors to make them, and this duty, if the directors declined to perform it, might be enforced by a decree in chancery, and that the relief sought in the bill before the court must be granted.

The judgment in the case of *The State* v. *Fasset*, contains much curious learning on the subject of proceedings by the grand jury in making indictments. Fasset, it may be recollected, committed a savage assault on Mr. John B. Dwight, a tutor in Yale College, a gentleman of most amiable temper, of learning, and of great

worth and promise. Two or three weeks after, and, as was alleged, in consequence of the assault, (which consisted in a deep stab with a dirk-knife in the groin of the thigh,) Mr. Dwight died. Fasset was indicted for an assault with intent to kill, and the questions in the case arose on a motion to quash the indictment for certain alleged irregularities in the proceedings of the grand jury — such as admitting evidence of Mr. Dwight's declarations made after the wound was inflicted, but not technically *in extremis*. The motion was overruled, and of course the case stood for trial, but whatever became of it does not appear. We have an impression of having heard that the accused was admitted to bail and paid the bond, which must be considered, we suppose, an equivalent for the act. Among the ancient Saxons, murder and treason, as well as lesser crimes, were compounded. It would be interesting to know what estimate is placed upon the life of a man in Connecticut — how much is the price of a stab, how much if it proves fatal, and how much if it was only intended to be fatal, and so of other offences.

The method of instituting criminal proceedings in Connecticut is in some respects peculiar. For crimes punishable with death or imprisonment for life, there must be an indictment found by the grand jury, in the same manner as in other states where the common law prevails. But for all the inferior offences, which furnish the great mass of the business and occupy much the greater part of the time of all criminal courts, such as larceny, counterfeiting, and all misdemeanors, no indictment by a grand jury is, in that state, necessary. The method of prosecution is by *information* by the attorney for the state (there is one in each county) somewhat after the manner of the information *ex officio* by the attorney-general in England — or more like the method that used to exist in that country, which was so greatly abused in the time of the court of the Star Chamber and afterwards, — abuses not corrected effectually until the time of William and Mary — to wit, by allowing informations to be filed by the master of the crown office, as he was called, at the relation of any party, or whenever that officer was sufficiently assured that a misdemeanor had been committed. The power of filing informations without any control was made so ill use of by the master of the crown office, "by permitting the subject to be harassed with vexatious informations whenever applied to by any malicious or revengeful prosecutor," that the statute of 4 and 5 W. & M. c. 18, was enacted, requiring the assent and direction of the court of king's bench before an information should be filed, and also requiring the prosecutor, at whose relation such information was promoted, to give bonds to

prosecute it, and to pay costs to the defendant in case of acquittal. No such guards or restrictions limit the discretion of the "state's attorney" in Connecticut, but whenever, from any source, he is satisfactorily assured a misdemeanor has been committed, he files his information, on which the accused must take his trial to the petit jury, just as on an indictment by the grand jury elsewhere. However objectionable such an arrangement may seem in theory, and to whatever abuses it may have been prostituted, in England, in times when to tamper with the purity and integrity of the bar or the bench was not an unusual artifice in the game of litigation — in practice in Connecticut this mode has continued to be followed, it is believed, without dissatisfaction and without abuse; and no one, whether conservative or reformer, has proposed to change it. Perhaps, in illustration of the sentiment that "the government that's best administered is best," much of the success and satisfaction that have attended this summary method of instituting criminal proceedings in that state are to be attributed to the judicious selection of experienced and discreet prosecuting officers, as well as to the care and supervision of their conduct which the court exercises. These officers are appointed by the courts in the respective counties, for two years, subject to removal by the same court at any time; but it is doubtful if the records of the courts furnish an instance of removal for mal-practice. The distinguishing advantage of such a method of prosecution, seems to be the saving the necessity and the expense of a cumbrous investigation by a grand jury of every petty offence. A case of violation of the license law, a common assault, or a petty larceny, it is presumed, might, without danger to the liberties of the citizen, be submitted to the judgment and discretion of the state or district attorney, to determine whether the evidence and circumstances were such as to warrant and call for a prosecution. In civil affairs, a judicious business man would seldom think, in ordinary cases of contemplated litigation, of summoning together a dozen or two of his neighbors, and submitting to them to decide by a majority of votes whether his evidence is sufficient to justify a suit. His better course would doubtless be to say as little as possible to his lay neighbors, and resort to and be guided by the opinions of counsel learned in the law.

The superior court in Connecticut is invested with the full equity powers of the high court of chancery in England, and some of the cases in the present volume illustrate the utility, convenience, and remedial justice to be found in the proper exercise of these powers. One peculiarity in the judicial arrangements in that state deserves

attention in Massachusetts, as possibly obviating, in some degree, one of the strongest of the popular objections to a court of chancery, or to the vesting full equity powers in the supreme judicial court. Although they have a court with ample equity powers in Connecticut, they have no masters in chancery. Testimony is taken *viva voce*, and the whole proceedings are as short and simple in equity as at law. Instead of sending a case to a master, a permanent officer, over whose appointment the parties can exercise no control; or having the whole evidence and proceedings conducted on paper, the court appoints in each case "a committee" of such a number, one or more judicious persons, as the case may seem to require, selected generally from those whose names are suggested to the court by the counsel of the parties respectively, unless, as more often happens, the parties themselves agree on the "committee." This "committee," of whom one at least is, in practice, invariably a member of the bar, hear the parties and their testimony *viva voce*, ascertain the *facts*, and make their report of those facts to the court in such a manner as to raise all questions that the parties may desire, on which the court then hear arguments and decide. The practical operation of this arrangement is not unlike that of an ordinary reference by a rule of court, where the referees, agreed on by the parties or selected by the court, are directed to decide conformably to the rules of law and to report the evidence if required by the parties. The origin of this system may be traced in the early legislative history of the colony. For a considerable period, the legislature in that, as in other colonies in the beginning of their history, and as anciently the parliament in England, exercised not only legislative but judicial powers. Whenever an aggrieved party could obtain no adequate remedy in the courts of law, he preferred his petition to the legislature. That body appointed a committee to investigate and report upon the case according to the usual parliamentary mode. When, by reason of the increase of business, the power of hearing and determining matters in equity was transferred from the legislature to the courts, the method of proceeding went with it; the practice of referring causes to a "committee" instead of sending them to permanent masters in chancery, and of taking testimony orally, whereby forms are abridged and expense is saved, has continued to be retained.

The unfair advantage which, by the practical operation of the insolvent law of Massachusetts — dissolving attachments on process from the state courts — is given to residents of other states and countries who have debts to collect in that commonwealth, and who, on process from the federal court, can make attachments, indissolu-

ble by insolvency, is such and so great, that business men in city and country exclaim against it, and are calling for a remedy. It is supposed no remedy can be obtained through the action of the state legislature; otherwise it would have been peremptorily demanded, and would have been granted long ago. Whether, if no other redress can be had, the expediency of abolishing the whole system of attachments on mesne process, at least during the continuance of the insolvent law, — a system peculiar to New England, and which, with some striking advantages, is often perverted to purposes of oppression and abuse — may not at length come to be considered, remains to be seen. At present, however, the citizens are looking earnestly to congress for a law which shall place them, in regard to the collection of debts in their own state, on a footing of equality, at least, with strangers and aliens. But there is another method of procedure, indispensable in a complete system of remedial justice for a civilized community, in relation to which aliens and citizens of other states have had for more than half a century, and continue to have, precisely the same advantages over the citizens of that state, on their own soil, as in the case of attachments. We, of course, allude to proceedings in equity — a matter wholly in the control of the people themselves through their state legislature. In frequent and most important cases of fraud and of accident, the citizen of Massachusetts is without a remedy for wrong, or the means of vindicating his rights. In the days of republican and of imperial Rome, it was held not an honor merely, but a source of protection against injustice and injury, for a man to be able to say, "I am a Roman citizen." But in Massachusetts, if a man has rights, however valuable, which through accident or fraud he is unable to vindicate in an ordinary action at law, the very last thing he could wish to say — it is complete death to his hopes, if, on inquiry, he is obliged to say, — "I am a citizen of the commonwealth of Massachusetts." A stranger could obtain redress, under the same circumstances, by a bill in equity, in the circuit court of the United States. Not so with the citizen — he is remediless. Happily for the citizens of Connecticut, no such prejudice has existed there, in relation to equity jurisprudence, as in Massachusetts — and cases of fraud, accident and others, remediless except in a court of equity, are by their simple processes adjudicated upon as easily, as cheaply, and as expeditiously, as cases at law.

The action of "book debt" is a peculiarity of Connecticut jurisprudence; though it has been adopted by Vermont, we believe, which received much of its early population and its system of laws from that state. The objects and uses of the action are similar to

those of the action of assumpsit, with an "account annexed," in Massachusetts, but is really a new form of action, or a modification of the common law action of debt. The plaintiff declares that the defendant owes him so many dollars "by book to balance book accounts," and makes profert of his book of accounts. No bill of particulars accompanies the writ, and the trial — in all cases before an auditor — is directly by the account books of the parties as well as on other testimony, the parties themselves being, both of them, witnesses in chief, on all points relating to the accounts, like any disinterested witness. The allowing a party to make testimony for himself by his books of account, and supporting them by his suppletory oath, as is the case in many other states, gives probably as much encouragement to fraud and perjury, as is salutary to the moral health of society. Whether the Connecticut practice, enlarging this privilege to the extent of making him a witness, in chief, in this peculiar action, is an improvement or not, we leave to be discussed by those who think, with Jeremy Bentham, that in judicial trials, as in the common business of life, all testimony, as well of the parties as hearsay, should be received. Common law lawyers will have little doubt on the question.

In one or two particulars, Connecticut has been a pioneer in the jurisprudence of the country. The earliest reports of judicial decisions, in America, were those of Kirby. The two volumes of Root followed, and these, with the volumes of Mr. Day, make the reports of that state more complete, from an early period, than those of any other. It was in that state, also, that the first great law school of the country was established, that of Judge Reeves, at Litchfield — a school at which many of the leading minds of the nation, in the elder class, in the senate, on the bench, and at the bar, received their legal training. That school is extinct now, but it was succeeded by the excellent and well-sustained institution in connection with Yale College, at New Haven, over which the venerable Chief Justice Daggett, (whom we formerly, by an unaccountable mistake, consigned to the dead,[1]) now more than an octogenarian, has so long and so satisfactorily presided.

In conclusion, we hope Mr. Day "may live a thousand years," and continue as active, efficient and able a reporter and law writer as he has been for the last forty.

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[1] See 8 Law Reporter, 93.

Recent American Decisions.

Circuit Court of the United States, Massachusetts District, October Term, 1846. At Boston. In Admiralty.

JOHN S. PACKARD *v.* THE SLOOP LOUISA.

Where a vessel was under fifty tons burthen, and not engaged in the foreign trade, or in the coasting trade out of the state, but with a license was employed in carrying and laying stone during summer in Quincy River and Massachusetts Bay, it is doubtful whether her employment was of that maritime character which would render the vessel liable for wages.

If a person is hired on board of her by the master, who has chartered the vessel of all the owners at a fixed proportion of the profits, and this fact is known to the person, if he signs no shipping-articles, and resorts to the master only for payment two or three years after the service is finished, and is paid in part by him, — it is strong evidence that the contract was originally with the master alone, and not intended to bind the owners as such, or the vessel.

This presumption is strengthened if the person was thus hired and employed to load and unload, and lay the stone, as well as to navigate the vessel, instead of signing shipping-articles, and being employed exclusively in marine duties. And the usage of a port, in such a case, has some influence.

A delay to institute proceedings against the vessel for wages for three years after they became due from the master, under the above circumstances and contract, and when in the mean time some of the owners had changed and become insolvent, exonerates her from the lien for wages.

There is no fixed time for liens to expire, which exist at common law, except the time of parting with the possession, and none in maritime liens, where possession does not exist with them exclusively, except the end of the next voyage, or the intervention, after it, of rights by third persons without notice.

THIS was an appeal from a decree of the district court, dismissing the following libel. It was filed by the libellant in November, 1845, against the sloop Louisa, of forty tons burthen, for wages due to him for services on board of her, commencing in March, 1842, and ending in November after. The libel alleged that Packard served as a seaman, hired by the master, Hersey, at twenty-three dollars per month, and that she was employed on the high seas, carrying stone, and he doing duty on board faithfully till duly discharged. The claimants were Seth Spear and John Briesler. Their answer denied that the libellant was a seaman in the Louisa, but averred that he contracted as a laborer, to load and lay stone

with the master, Hersey; and denied that the vessel, employed as she was, ever became responsible for wages, she being hired by the master of the owners, in carrying and laying stone, within the state of Massachusetts, for one third of the profits; and that this was known to the libellant. It insisted also, that if the Louisa was ever liable, she had ceased to be so by Packard's resorting to the master, and receiving payment partially of him, and by the delay to institute proceedings against the vessel so long, and till the ownership had, in part, become changed.

Kingsbury, counsel for the libellant.
W. S. Morton, of Quincy, for the vessel and claimants.

Woodbury, J. The evidence and agreements of counsel in this case accord in substance with the facts set out in the libel and answer. Packard is proved to have actually served on board the vessel, both in loading stone, and in navigating her. She was of $40\frac{3}{95}$ tons burthen, and employed in transporting stone within the state of Massachusetts, and laying it, without shipping-papers signed by the crew, or any regular clearances, except a coasting license. The libellant and Hersey came to a settlement in the winter of 1843, and part of what was due has since been paid by Hersey. It was shown that Spear owned three-fourths of her, and Hersey one fourth, and that the former, in June, 1844, said that Hersey ought to pay Packard what was due, and he hoped that P. would not libel the vessel; and that about the first of March, 1845, Spear was again notified that the debt was unpaid. From sixty to seventy dollars still remained so. It was further shown, that in such vessels, under such contracts, the wages were considered a claim on the master and not on the owners.

It is a matter of regret that some of the details as to the employment and papers of this vessel, are not more fully proved and alleged. It is, however, questionable, on all the facts as they stand, whether the Louisa, in such an employment within the river, at Quincy, and within Massachusetts Bay, without any regular clearances, ought to be deemed a vessel liable to any lien for the wages of men, not hired as seamen under any shipping-articles, or exclusively for navigating her. *Thackeray* v. *Palmer*, (Gilpin, D. C. 524.) Here their business was to help to load, unload, and lay the stone, no less than to navigate her. Whether unloading a vessel belongs to a seaman, as such, depends on the usage of particular places, the heat of the climate, and the character of the hiring and voyage. *The Happy Return*, (1 Peters's Adm. 254–5); *The*

Mary, (Ware, 454.) By the laws of Oleron, (Dunlap's Ad. R. 98,) it appears that particular officers once existed for this purpose. It is certain, however, that *laying stone* is no part of the business of a seaman. This vessel, and the employment of Packard, seem to have been of a mixed or amphibious character, not distinctly and exclusively marine: and at the same time, not distinctly and exclusively independent of marine service and marine liabilities. The vessel was not destined to carry freight in the coasting trade from state to state, nor for people in general; nor merely to carry stone for particular objects, but to carry it for special purposes within the bay, and aid in laying it in wharves and other ways. And Packard was engaged to work in the latter employment as a laborer, as well as in navigating the vessel, and on a contract with Hersey, who had hired her of the owners, and not under ordinary shipping-articles with the owners.

The questions then are, had he a lien for his wages in such a vessel, or for such an employment, either by an express contract, or act of congress, or any principles of admiralty law? The claim of a seaman on the vessel for his wages is, at any time, rather an equitable privilege than a technical hypothecation of the vessel. *Brig Nestor*, (1 Sumner, 82); 2 Brown's Civ. and Adm. Law, 142; Story on Bailm. sec. 288. It is a charge on her as a favor for priority of payment, if seasonably enforced. It is given in certain cases by admiralty law, and of course it cannot be sustained there, as that law is founded on the civil law, except where equitable; (see cases cited post); and in many respects in its character looking for what is equitable, it must be regarded as analogous to other liens, given otherwise than by express statute or express contract. When such statutes or contracts provide for it, they of course furnish the limitations and conditions. But here no specific agreement is pretended to have been made for such a lien, as in case of pledges and mortgages. Nor is any state statutes cited on the subject, such as exist at times in favor of mechanics on houses.

Nor can it be pretended that any lien is probably created, in a case like this, by the acts of congress. There are but two on this subject. One, passed July 20th, 1790, relates to vessels when bound to a foreign port, or if of fifty tons burthen, and engaged in the coasting trade beyond the neighboring state, and then gives a lien on vessels, which probably means such vessels as just described. The other, passed June 19th, 1813, gives it to all vessels engaged in the bank or cod fisheries. This vessel, the Louisa, was of less than fifty tons burthen, and not engaged in the coasting trade out of the state, nor employed in the foreign trade, or in the bank or cod fisheries, and of

course the libellant can claim nothing from her in these views. As these acts, however, do not prohibit liens for wages created by any principles of admiralty law, on vessels of less than fifty tons burthen, they may, when coming within those principles, be sustained by this court on appeals, under the jurisdiction expressly conferred on the district courts, by the ninth section of the judiciary act of 1789. (3 Dall. 54–6; 8 Cranch, 137.)

But, on those general principles, where and how employed must the vessel be, to give a lien? and to whom on board? It must be an employment from one port to another; and not merely along shore, or in the shore fisheries. (1 Kent, 343; Abbot on Shipp. 476–7.) It must also be at sea. (Ibid.); *Case of the Thomas Jefferson*, (10 Wheat. 428); *Stone* v. *Gadet*, (Bee's Adm. 93); *Montgomery* v. *Henry*, (1 Dallas, 50.) Not lying merely at a *wharf*. *Phillips et. al.* v. *Thomas Scattergood*, (Gilpin, 3.) Not as *ferry* boats. *Smith* v. *The Pekin*, (Gilp. 205, 532); or merely carrying wood across a river, (524.)

And it must be from one port to another, where the tide ebbs and flows, (Ibid.); and not on fresh water. *The Orleans* v. *The Phœbus*, (11 Pet. 183–4); *Janry* v. *Col. Free Comp.* (10 Wheat. 418, 428.) The person libelling must also be engaged in *maritime duties* on board. *Case of the Phœbus*, (10 Wheat. 428); 11 Peters.

The next inquiry is, what are such duties, and to whom is the lien given, if on board a suitable vessel, or one engaged in maritime employment? Not *carpenters* on board, though they may have a lien at times as mechanics, or if acting as seamen. *The Schooner Hobart*, (2 Dodson, 104); 3 Gall. 398; Bee's Adm. 78–9, 165; 2 Gall. 345; 1 Wheat. 96; 4 Ibid. 438. Not a pilot from Gravesend to Deptford. *Ross* v. *Walker*, (2 Wills. 264); *Tranier* v. *Superior*, (Gilp. 516.)

Though it does include pilots on the high seas. (6 Rob. 227; 1 Mason, 508.) And pilot, deck hands, engineers and firemen, may sue *in rem* against a steamboat. (Ibid. 505.) All these are engaged in what is really *maritime*. But not mere landsmen on board, as physicians. *The New Jersey* (1 Peters's Adm. 230–3); 2 Dodd. Adm. 104; *Miles* v. *Long*, (Sayer, 136); *Tranier* v. *Superior*, (Gilp. 516.) It is doubtful, therefore, whether Packard's employment on board of the Louisa, partly in loading and laying stone, or the business of the sloop herself, could be regarded as strictly maritime and commercial. It seemed to be not wholly that of the sailor, whose services in and for the ship, and whose reckless character in ocean dangers, have made the law indulge him with this additional security.

And if this kind of claim be not contemplated by the parties from the character of the vessel, or nature of the duties required of the men, it would be unjust to let it be set up against the vessel. Such is the case with seamen on board ships of war, or revenue cutters, — and for the reasons that the employment of such vessels and such seamen is not entirely commercial, as well as that the ownership of the vessels, being in the government, bars the practicability of any resort to them for wages having been contemplated, as well as prevents their liability. *The Schooner Caroline*, (Bee's Ad. 112, 422); Abbott on Shipp. 476; Hopkins's Cases, 104. But the lien is not lost if the vessel merely carries the public mail. (2 Dodson R. 100.) Nor in letters of marque which pay wages, and are engaged in commerce; but otherwise with mere privateers, paid by shares. *Ellison et. al.* v. *Bellona*, (Bee's Adm. 112.)

So there may be other circumstances connected with a transaction which repel or rebut the idea that parties looked to a lien. And when these occur, the lien either does not attach, or the evidence of such circumstances shows it to be relinquished. *Crowshay* v. *Hompay*, (4 Barn. & Ald. 50.) Thus, in the present case, beside the equivocal or ambiguous position of the libellant, and of the vessel in which he labored, there had been a hiring of the Louisa, by the captain, of the other owners, and a contract by the captain with Packard, not as captain of her for the owners, but for himself; it being his duty as the charterer of her, to supply the men. All this was known to Packard; and he signed no shipping articles, and perhaps he ought to be considered as having no expectation of a lien, originally, on the vessel. In some cases this inference might not arise from that alone. *The Regulus*, (1 Peters's Adm. 212, 213, note); *The Crusader*, (Ware, 447.) But here, coupled with the other facts, it looks like an agreement, made to serve for the captain rather than the owners, when the latter had hired the vessel at a fixed freight, and also hired the men, with a knowledge of his contract. The captain could not resort to the vessel for any services or wages of himself, by the admiralty law. *The Orleans* v. *The Phœbus*, (11 Peters, 184); *The Ship New Jersey*, (1 Peters's Adm. 226–9, 247, note); *The Scattergood*, (Gilp. R. 2); 2 Rob. Adm. 196; Abbott on Shipp. 476; *Montgomery* v. *Henry et al.* (1 Dall. 50); *sed quære*, (2 Gall. 456–7.) Such are the decisions, rather forced on the admiralty by courts of law. Because on principle and analogy, the master should have the same lien on the vessel as the seamen. (2 Brown's Civ. and Ad. Law. 95, 96.) But notwithstanding his claim on principle in

cases generally, he could not have it here, as being not employed by the owners, or working for the ship, but for himself; and it seems just that a seamen so employed by him, and with a full knowledge of all these facts, should stand in a like position. A different course would be tantamount to giving Packard a claim on the owners, as owners, when they had not employed him; nor had their agent done it for them. There must have been no knowledge of the facts or the repairs very durable, or the charter must have contemplated it, if the owners are liable for repairs, though the master has hired the vessel, and orders them. (Molloy, 355; 2 Brown's Civ. and Ad.135.) The usage in such case to look to the captain would be nothing more than what seems legal and reasonable.

In new cases an existing usage should not be without some influence. *The George*, (1 Sumner, 151); *The Reeside*, (2 Sumner, 267.) Indeed, usage governs often at particular places, as to the duties, and also the usages of seamen. (1 Peters's Adm. 193, note; Ware, 454.) But however any of these views may be, in their force and weight, I think the dismissal of this libel by the district court is on another ground so well supported, both by principle and authority, that the decree ought not to be reversed. It is the long delay to resort to the vessel, and when, in the mean time, the owners had changed, and one of them become insolvent. The claim of a seaman for wages on the vessel, is a species of lien upon an article, which he should not long forbear to enforce, or it may become inequitable. Having assisted to keep in repair, and navigate and use her for purposes profitable to the owners, and having been so attached to it by a contract or shipping-papers, and having been exposed to all the risks, and toils, and responsibilities of a seaman in her, he is allowed a privilege to charge and hold on upon her for his payment. But all analogies show that the claim, if renewed after long abandoned, will mislead the public as well as the owners; and embarrass commerce and sales, through secret and unknown and unrecorded outstanding claims. Maritime liens are not, like common law liens, limited to possession. *Nestor*, (1 Sumner, 83.) Indeed, exclusive possession seldom accompanies them at all. But they are claims *in rem*, or charges *in rem*, having priority, and are to be seasonably enforced, else they may work great fraud in the community, where possession is not taken or retained; and no public register or record is made of them, and the property thus secretly encumbered is allowed to depart, it may be, again and again, to the opposite side of the globe. *Nestor*, (1 Sumner, 87); *Ex parte Foster*, (2 Story, 145.) Hence

where congress has given an express lien in the two acts before referred to, they evidently contemplate, as a part of sound public policy, a speedy and prompt enforcement of it.

The first act provides that seamen, "as soon as the voyage is ended" and the cargo and ballast fully discharged, "shall be entitled to all the wages due; and if not paid in ten days, or if a dispute arises, the master shall be summoned to show cause why process shall not issue against the vessel," according to the course of admiralty, to answer for the said wages; "and if the master neglects to appear or settle for the wages, process is to issue *forthwith*, and the master must produce the contract or day-book," and if the vessel is about to proceed to sea before the ten days have expired, or has left the port of delivery before paying the wages, "*immediate* process out of any court having admiralty jurisdiction" may be had. This looks to early proceedings only, and contemplates only ten days' delay, and indeed no departure of the vessel, even on a new voyage, till the libel should be filed. And if she does in the mean time depart, or prepares to depart, a process still earlier than ten days can be instituted against her. In the case of fishing vessels, the claim given to the seamen on the vessel is, by the act of June 19th, 1813, sec. 2, *limited* to six months after the sale of the fish or fare; but is given for that period as fully as in the merchant service. Indeed the sailor, after reaching land, is so impatient for his wages, and so needy, that he will seldom consent to wait long, unless his contract or service has been of a land character rather than maritime, and his habits partake more of the former business. The law, in order to protect him under his improvident habits, when a mere seaman, gives him three modes of redress and security, so as speedily and surely to obtain his just dues. But, doing this, and following the claim on the vessel, even to the last plank or nail, if wrecked or condemned, (1 Dods. Adm. 40; Ware, 41; 2 Dods.), yet a corresponding diligence must be exercised, in order to secure freedom and safety to commercial transfers of property against secret liens. A prominent reason for giving him a libel in the admiralty, against the ship, is, that he may at once detain her for security; and another is, that the admiralty court being always open, he may obtain satisfaction sooner than by a suit at common law. (2 Brown Civ. and Ad. Law, 77, 85.)

Most other liens, raised by implication, if at common law, are dissolved by a separation from the goods, which is paramount and of much length. 1 Es. C. 109; 1 D. & E. 4; 3 D. & E. 119; 6 East, 27.) The innkeeper has it only till his guest receives

his baggage, and quits. The common-carrier does not retain his lien after the articles are delivered over. Even in maritime cases, a lien on goods for freight is lost, if the goods are delivered, or time is allowed to the charterer of the vessel to make payment of the freight. (2 Ld. R. 974; 6 Mod. 12; 11 Mod. 6; 4 Adolph. & Ellis, 260; 2 Brown Civ. and Ad. Law, 82.) In many cases, liens on domestic ships by those repairing or furnishing materials for repairs are also lost, if the ships are allowed to go to sea without the liens being enforced on them. (1 Gilpin D. C. 105; Montague on Liens, 19; 2 Moore, 34; Abb. on Shipp. 77, etc.; 8 Wheat. 268; 2 Dow. 29; 11 Mass. 34; 15 Johns. 298; 16 Johns. 89.) But there may be cases of supplies furnished, or money advanced to the master in a foreign place, which are not secured by an express contract of bottomry or mortgage, and time expressly given, but being to be repaid usually out of the fruits of the voyage, may rest on a different ground, and create liens for the whole voyage, or longer. It is not here pertinent to examine them, and I merely allude to them with a view to exclude them. (See *Leland* v. *The Medora*, post.) Again, a lien on goods for salvage is lost, if the goods are given up to the possession of the owner. *The Fair American*, (1 Peters's Ad. 94, 95.) The policy of the law to shorten such liens, is manifested also in those which are expressly allowed by statute. Thus where a lien has been created by express statute, in favor of mechanics on houses they have helped to build for others, it usually is made to last for only six months, and sometimes but thirty or sixty days. They too are at times required to be recorded. (See the Revised Statutes of Massachusetts.) All these limitations are wise, whether created by statute or usage, so as to prevent secret claims from existing on property, independent of its possession, and independent of what is recorded by mortgages or otherwise; and so as to obviate litigation, and remove speedily any obstacle to the free disposal and circulation of property. To allow a seaman, then, after his voyage is over and his contract ended, and his connection with the vessel dissolved, and he embarked for years in employment elsewhere, to retain a secret claim on the vessel, and thus prevent her sale or use, unincumbered, and thus embarrass any new purchaser without notice, would be very bad policy. (Abbott on Shipp. 187, note, and 539, note); *The Rebecca*, (Ware, 212); (3 Kent's Com. 198.) Much more would the long continuance of the lien, under these circumstances, not be reasonable, if the lien itself, for any time whatever, was doubtful from the nature of his undertaking; as here, being as much that of a laborer to lay the stone, which the vessel carried, as

to navigate her, and not having signed any shipping-articles as a seaman, nor being engaged on the high seas, or even in the coasting trade to other states.

The seaman, like the common-carrier or innkeeper, or mechanic, would still be able to sue on his contract, till barred by some other equitable defence, or by some statute of limitations. By the statute of Anne, he is not barred, in an action at law for wages not till six years. (See *Jay* v. *Allen*, at this term.)

Again, in equity, a party, though otherwise chargeable, is sometimes relieved if there has been such delay in the complainant as to prevent the respondent from having a remedy ever so good as if prosecuted earlier. See *Medron et al.* v. *Crosby et al.* (Maine Dist. C. Court, Oct. 1846.) If the delay leads to new interests and relations, it operates against the plaintiff guilty of it, and sometimes lessens the amount to be refunded, and at others prevents the rescinding of a contract. Courts of admiralty, on the matters within their jurisdiction, must be governed by equitable principles. 8 Pet. 538; 2 Mason, 561; 3 Mason, 16; 1 Haggard Adm. 176, 357. They are chancery courts for the sea. (See *Jay* v. *Allen*, this term.) Here a new owner of one quarter has come in instead of Hersey, and any remedy over against the latter had become worthless by his insolvency.

This part of the case, it will be seen, does not go on the ground that the claim of the plaintiff is based on his contract with the master in two or three years, or in any period short of the statute of limitations, as before suggested, if one exists. (Angel & Ames on Limitations, ch. 4, § 3; 2 Sumner R. 212; 3 Sumner R. 286.) But it rather proceeds on the ground, that if the seaman sets up an equitable lien on the vessel as collateral security to that contract, and one raised by construction of law, and not regulated by express contract or positive statute, he must enforce it within an equitable period, considering the nature of the lien and of the employment of the vessel, and the charges of interest happening in it. If he asks equity, in this respect, it must be by doing equity, and not violating it. Where the vessel was so situated that the interests in her could not be changed, as, if condemned abroad, (as in *Pitman* v. *Hooper*, 3 Sumner R. 286); or where the length of time is accounted for by absence of the seaman or want of recovery for the vessel when condemned or lost after freight is earned; *Shephard et al.* v. *Taylor et al.* (5 Peters R. 675); the only bar, perhaps, in most cases, is the statute of limitations, or what is equivalent to it. All depends, if the title in the vessel has not been sold, on the circumstances and the equities of the case.

(3 Kent's Com. 196); *Blaine* v. *Ch. Carter*, (4 Cran. 328); 3 Haggard Adm. 238; *The Sarah Ann*, (2 Sumner's R. 213); Bee's Adm. 86; *The Rebecca*, (Ware's R. 212); *Eastern Star*, (Ware's R. 186); *Ship Mary*, (1 Paine, 181); Curtis on American Seamen, 321; 2 Story's R. 468. These may require, as a general rule, that the lien for wages is to end, if not enforced soon after the voyage ends. (Semb. 4 Cranch, 328.) See former analogies. And yet cases may occur where equity would enlarge the time, on some facts, to one year, and on others to several years. Where the vessel continues in existence and employed, or is sold without notice, no case has been found where the lien extended beyond the end of the next voyage. Ware R. 212, 213. The time of delay there was only nine months. If an owner himself neglects to resume a claim on his ship, once derelict or abandoned, a year and a day, he is estopped from recovering his own property. Ware's R. 44; 1 Rob. Adm. 34; 2 Brown's Civil and Adm. Law, 49. Justice Livingston says, there is no rule requiring seamen to prosecute at once, — though in France, after a sale of a vessel and one voyage, they will not allow a proceeding *in rem*. *The Ship Mary*, (1 Paine C. L. 185.) In that case, the seamen were discharged at New Orleans, and prosecuted at New York, their home, as soon as the ship returned there from Liverpool, which was her originally intended voyage. (p. 186.) Though she remained some time at New Orleans, over six months, yet she was soon speedily on her return.

The present case is therefore decided on its own peculiarities, as before explained. Again, if the responsibility of the vessel were for the fulfilment of the contract of the master, if existing at all, was considered like that of a surety for the master, being collateral, though it is not so strong as that, how incumbent would it be to resort to the surety early, and not sleep over his claims, till the original debtor becomes insolvent, and the interests of the owners have changed? The United States laws, as to sureties of deputy postmasters, on account of the danger of injury to them by long delays, expressly exonerate them, if the principal be not sued in two years after the debt is liquidated. So in courts of equity, sureties are often exonerated by negligence as to the principals, or giving them new and extraordinary forbearance, if the liability over has been injured or lost by the principal becoming insolvent, after the usual credit or agreed delay expired, or after the claim ought to have been enforced according to the ordinary course of business and its usages. 7 Johns. 332, semb.; 13 Johns. 383; *King* v. *Baldwin*, (17 Johns. 384.)

There is another ground of defence under positive precedents, which might be urged so far as regards the new owner in the ship and his interests in common cases. He is a purchaser for valuable consideration without notice, for aught which appears, of this secret outstanding trust, and usually would hold property, thus purchased, exonerated from such a trust. 2 Story's Eq. Jurisp. 1216, 1228; 9 Vesey, jun. 100. This would be correct in relation to trusts on land, growing out of parol agreements. So in mortgages of personal property not recorded, where they are required to be recorded. In the case in Ware, 212, 213, the purchase was with notice. So in *The Rebecca*, (Ware, 188.) But in case of liens like this, it deserves more consideration before I could allow it to prevail, even as to that purchaser, if the want of notice stood as the only answer to this claim, so much like a bottomry claim, and of which a record or notice is not necessary. See *Leland* v. *The Medora*.

On the whole facts, the nearest precedent which I have found is this. In the case of a lien on a vessel by a bottomry bond, created July 14, 1796, and to take effect on the arrival of the vessel in Europe. She went thither, and returned here Sept. 28th, 1796; but she was not then arrested or libelled to pay it, and it was delayed till the 19th January, 1798, between which periods she had made two voyages, and been attached by creditors. It was held that the lien had thus become discharged. *Blaine* v. *Ship Charles Carter et al.* (4 Cranch, 328.) But this was less delay than has occurred here; and Justice Story says, in Notes to Abbott on Shipping, 539, that the rule would be similar in a *lien for wages* as in a bottomry lien.

The decree below is affirmed.

District Court of the United States, Massachusetts District, December Term, 1846, *at Boston*.

UNITED STATES *v.* JAMES M. THOMPSON.

The act of congress prohibiting the establishment of private expresses, is constitutional.

If the mail is actually carried over a railroad, under the authority of the post-office department, with the assent of, and by an arrangement with the railroad corporation, that is sufficient to answer the requirements of the statute, notwithstanding no formal written contract has been made.

The establishment of an express, one of the purposes of which is the carrying of letters over such a route, is a violation of the law. Nor does it make any difference, that they are carried without distinct compensation. But the proprietor of such an express might take a document giving him authority to receive merchandise on presenting the same, or a receipt for his own protection for articles delivered.

The proprietor of such an express is liable only for acts done or authorized by himself. And if he authorized acts amounting to a violation of the law, he is guilty, although he did not know they would amount to such a violation. And if he authorized the carrying of one class of letters forbidden by law, and his agent carried one of another class, also forbidden by law, mistaking it for one of the former class, he was not criminally responsible therefor.

THIS was an indictment, alleging that the defendant, subsequently to the 3d day of March, 1845, to wit, on the 28th day of July, 1846, at Springfield, did establish a private express for the conveyance of, and cause to be conveyed, and provided for the conveyance and transportation of, by regular trips, and at stated periods and intervals, from one city, town or place in the United States to another, to wit, from Springfield to Chester Village, (between which places the United States mail was regularly transported under the authority of the post-office department,) letters, and packages of letters, and packets, properly transmittible by mail, and not being newspapers, pamphlets nor magazines; and on the said day, offending against the statute of the United States, by the instrumentality of William E. D. Miller, conveyed a letter from Springfield to Chester Village, which letter was properly transmittible by mail, and was not a newspaper, &c. The second count alleged the carrying of a letter from Springfield to Chester Factories, on the 25th of August, 1846; and the third and fourth counts, the carrying of letters from Springfield to Albany, on the 20th and 26th of August, in the same manner.

The indictment was founded on the 9th section of the statute of 1845, in relation to the post-office department. It was proved that the defendant ran an express over the Western Railroad; but he contended that it was not established for carrying letters, as such, or mailable matter forbidden by law to be carried by a private express. It was also proved that the United States mail was carried over the same route, under an arrangement between the department and the directors of the railroad, and that there had been no failure or irregularity in the transportation from April 1 to the date of the indictment; but no written contract had been executed, and the defendant contended that therefore the railroad was not a route over which the mail was regularly transported under the authority of the department, within the meaning of the law. There

had been some correspondence on the subject, and an attempt to complete a definite contract; but difficulties had arisen in relation to fixing one regular hour for starting through the year. The mail was, however, transported over the road, and a car fitted up for the agents of the department, and payments made quarterly by the department. A letter from Mr. Gilmore to the department was put into the case, dated in June, 1846, stating the difficulties in the way of completing a written contract, and proposing to continue the transportation of the mail as before; and it continued to be so transported.

The defendant also contended, and offered evidence to show, that he had directed his agents to carry no mailable matter, and no letters except such as were in the nature of orders for goods to be carried by his express, or of receipts for goods or money delivered, or letters enclosing money, bills, drafts, checks, or notes; — and that, if any other letters were carried by his agents, it was in violation of his instructions, so that he was not responsible therefor. The counsel for the government offered evidence to prove the carrying of all the four letters charged in the indictment, but did not rely upon the last two as sufficiently proved. The defendant further contended, that that part of the statute which prohibited the establishment of private expresses, was unconstitutional.

R. Rantoul, Jr., district attorney, for the United States.

Rufus Choate, and Mr. *Ashmun*, (whose place was taken by Mr. *Chapman* in the latter part of the trial,) for the defendant.

Sprague, J. charged the jury, (1) that the law in question was constitutional; (2) that if the mail was actually carried over the route in question, under the authority of the post-office department, with the assent of, and by arrangement with the railroad corporation, that was sufficient to answer the requirements of the statute in question, notwithstanding no formal written contract had been executed; and (3) that if Thompson had established an express, of which one of the purposes was the carrying of letters over such a route, he was guilty of a violation of the law, and was liable to a penalty for each letter proved to have been so carried. It was not necessary, in order to constitute the offence, that the carrying of letters should be the *sole* business of the express; but it was requisite that that should have been one of the purposes. The accidental transmission of a letter was not sufficient, if not authorized by Thompson himself; he must have intended that it should be carried. It was not necessary that he should have intended to

violate what he supposed to be the law, but he must have intended to commit an act, which act would amount to a violation of the law. Every one was bound to know the law. The word *letter* had no technical meaning, but must be understood in the sense in which it was generally understood among business men.

It had been argued, that Thompson had a right, as a common-carrier, to carry any papers incidental to that business. The court ruled, that if he merely took a document giving him authority to receive merchandise on presenting the same, as, for instance, a power of attorney, — or if he took a receipt for his own protection, for the delivery of articles carried by him, he had a right so to do. But he must not take a letter from one person to carry it to another, unless it were a letter relating to a cargo or article carried at the same time with the letter.

The defendant was not answerable for any acts of his agents, which were not authorized by him, either expressly or impliedly. But if his instructions were in general terms, not to carry any mailable matter, and he still assented to, or approved of, the carrying of what *was* mailable, whether or not he knew that the laws embraced such matter, he violated the law.

The defendant had contended that no letters were carried by him except letters connected with his business, as a merchandise express, and that for such letters he made no charge, and received the same compensation for transporting merchandise, from those who did and those who did not send letters; and that, under the eleventh section of the statute, he was authorized so to carry them. But the court ruled that the eleventh section did not authorize the defendant to establish an express for the carrying of letters in connection with, or as a part of his business of a merchandise express, although no charge was made for letters as such. That the tenor and scope of the ninth section was to prevent such competition with the post-office department.

The jury, after being out about two hours and a half, returned for further instructions from the court; and were instructed, that it was not necessary that Thompson should know of the individual letter proved to have been carried by his agent, if it was carried pursuant to his authority; and further, that if the defendant had authorized his agent to carry one class of letters forbidden by law, and prohibited him from carrying another class, also forbidden by law, and the agent carried a letter of the second class, mistaking it for one of the first, the defendant would not be criminally responsible therefor, the letter not being carried by his authority, either tacit or express.

The jury returned a verdict of not guilty.

Supreme Judicial Court of Massachusetts, Middlesex County, October Term, 1846.

COMMONWEALTH *v.* ZECHARIAH PORTER.

It is the proper province of the court to declare the law; and that of the jury to inquire into the facts, according to the rules of law declared by the court.

In all criminal cases, it is competent for the jury, if they see fit, to decide upon all questions of fact, embraced in the issue, and to refer the law arising thereon to the court, in the form of a special verdict.

But it is optional with the jury thus to return a special verdict or not; and it is within their legitimate province and power to return a general verdict, if they choose.

In thus rendering a general verdict, the jury must necessarily pass upon the whole issue, compounded of the law and of the fact, and may thus incidentally pass on questions of law.

If the court express or intimate any opinion upon any question of fact involved in the issue, the jury may revise, reconsider, and decide contrary to such opinion, if, in their judgment, it is not correct, and warranted by the evidence.

It is the duty of the court to instruct the jury upon all questions of law which appear to arise in the case, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court, upon matters of law.

It is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts proved by them. And it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matters of law.

It is within the legitimate power and the duty of the court, to superintend the course of the trial, to decide upon the admission and rejection of evidence, to decide upon the use of any books, papers, documents, cases, or works of supposed authority, which may be offered upon either side, to decide upon all collateral and incidental proceedings, and to confine parties and counsel to the matters within the issue.

The defendant has a right, by himself or his counsel, to address the jury, under the general superintendence of the court, upon all the material questions involved in the issue; and to this extent, and in this connection, to address the jury upon such questions of law as come within the issue to be tried.

In this case, it appearing, by the bill of exceptions, that the defendant's counsel were prohibited from addressing the jury upon questions of law embraced in the issue, the verdict was set aside, and a new trial granted.

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by

SHAW, C. J. This case comes before the court upon a bill of exceptions, and one question is, whether, in a criminal prosecution against the defendant for an alleged violation of the license laws, his counsel have a right to address the jury, upon the questions of law

embraced in the issue. It has been argued on the part of the defendant, that in all criminal prosecutions, it is within the legitimate right and proper duty of juries, to adjudicate and decide on questions of law as well as questions of fact; and that although the judge may instruct and direct them upon a question of law, and they fully comprehend and understand those directions, in their application to the facts of the case, yet that they are invested by law with a legitimate power and authority, if their judgments do not coincide with that of the judge, to disregard it, and decide in conformity with their own views of the law. If this were a correct view of the law, it would undoubtedly follow, as a necessary consequence, that in such appeal from the court to the jury, the counsel on both sides would have a right to argue the questions of law to the jury. But if this proposition is not correct, it does not follow, we think, as a necessary consequence, that the counsel cannot address the jury, upon the law, under the direction of the court. They are, in our view, separate and distinct questions, to be separately considered.

We consider it a well-settled principle and rule, lying at the foundation of jury trial, admitted and recognized, ever since jury trial has been adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law, which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper province and duty of the jury, to weigh and consider evidence, and decide all questions of fact, and that the responsibility of a correct decision is placed upon them. And the safety, efficacy, and purity of jury trial depend upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court, on a jury trial, to decide authoritatively on the questions of fact, and for the jury to decide ultimately and authoritatively upon the questions of law. And the obligations of each are of a like nature, being that of a high legal and moral obligation to the performance of an important duty, enforced and sanctioned by an oath.

This, as a general principle, is applicable alike to civil and criminal cases, though in both it must be varied in its practical application, according to the forms of proceeding and the mode in which the question arises. If the form of proceeding is such, that the law and the fact can be distinctly presented, then, after the fact is established, either by the pleadings or by a special verdict, the court decide the law and pronounce the judgment, without the further intervention of a jury; as in case of a demurrer or special verdict.

Indeed, the whole system of special pleading, which, though now disused in this commonwealth by a recent statute, is intimately interwoven with the whole texture of the common law, was founded upon an apparently anxious desire of the common law, so to separate questions of fact from questions of law, as to enable courts to pronounce on matter of law, leaving contested facts only to be put in issue, and to be tried and decided by the jury.

The whole doctrine of bills of exception, now in such general and familiar use, both in civil and criminal proceedings, is founded upon the same great and leading idea. It presupposes, that it is within the authority and that it is the duty of the judge, to instruct and direct the jury authoritatively, upon such questions of law as may seem to him to be material for the jury to understand and apply, in the issue to be tried; and he may also be required so to instruct upon any pertinent question of law, within the issue, upon which either party may request him to instruct. The doctrine also assumes, that the jury understand and follow such instruction in matter of law. This results from the consideration, that if such instruction be either given or refused, it is the duty of the judge to state it in a bill of exceptions, so that it may be placed on the record; and if the verdict is against the party who took the exception, and it appears, upon a revision of the point of law, that the decision is incorrect, either in giving or refusing such instruction, the verdict is set aside, as a matter of course. To this conclusion the law could come, on the assumption that it was the right and duty of the court to instruct the jury in matter of law, that the jury understood it, and, as a matter of duty, were bound to follow it, so that if the instruction was wrong, the law assumes, as a necessary legal consequence, that the verdict was wrong, and sets it aside. The law could only assume this, upon the strength of the well-known and reasonable presumption, that all persons, in the absence of proof to the contrary, do that which it is their duty to do. It is presumed that the jury followed the instruction of the court, in matter of law, because it was their duty so to do, and therefore, if the instruction was wrong, the verdict is wrong. But if the jury could rightly exercise their own judgment, and decide contrary to the direction of the court, as they unquestionably may do, in regard to questions of fact, no such presumption would follow; it would be left entirely in doubt, whether the jury had been misled or influenced by the incorrect direction in matter of law, and therefore there would alone be no sufficient ground for setting aside the verdict. But entirely otherwise it is in regard to a matter of fact, in respect to which it is within the proper authority, and it is the

duty of the jury, to exercise their judgment authoritatively and definitively. And should a judge express or intimate any opinion upon a question of fact, however incorrect it might be afterwards found to be, upon a revision by a higher court, it would not necessarily afford a ground for a new trial; for, it not being the duty of the jury to follow it, there would be no presumption that they have followed it, and therefore it would not of itself show, conclusively, that the verdict was wrong.

And it is to be considered that this doctrine and practice, in regard to exceptions, apply as well to criminal as to civil trials, at least so far as they can operate for the protection and security of parties accused. Indeed, so solicitous have been the legislature of this commonwealth, that all persons put on trial for alleged offences shall have the full benefit of the opinion and judgment of the court upon all questions of law, and a revision thereof by the court of last resort, on suitable occasions, that it has specially provided that if, upon the trial of any person who shall be convicted, any question of law shall arise, which, in the opinion of the presiding judge, shall be so important or so doubtful as to require the decision of the supreme judicial court, although such person has no counsel to defend him, or the counsel have not seen fit to take the exception, the judge may, on his own sense of propriety and duty, reserve it, and thereupon all further proceedings in that court shall be stayed. Rev. Stat. ch. 138, § 12.

This leads to another view of this subject which seems to us to be of great importance, and this is, that every citizen of the commonwealth has a right to the benefit and protection of the law. Whilst he is liable to its penalties, he has a right to be tried by law, and he is entitled to the authoritative declaration and application of the law to his case, as his best and highest protection. It is manifestly of great importance, in order to effect such protection of the rights of parties, that the laws to which they are amenable shall be fixed and permanent, impartially applied to all persons and cases alike, and not fluctuating and variable. This result seems to have been looked to, with great anxiety, by the framers of our constitution, in the declaration of rights. Art. 10. Each individual of the society has a right to be protected by it, in the enjoyment of his life, liberty, and property, by standing laws. Art. 39. It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen, to be tried by judges as free, impartial and independent, as the lot of humanity will admit. Art. 13. In crim-

inal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen. These seem to be trite, familiar truths; but the declaration of rights itself declares, Art. 18, that a frequent recurrence to them is absolutely necessary to preserve the advantages of liberty, and to maintain a free government. And it requires, both of lawgivers and magistrates, an exact and constant observance of them in the formation and execution of the laws, necessary to the good administration of the commonwealth.

These provisions manifest an ardent desire and a wise determination, as far as the imperfection of all human things would allow, to make the law paramount and supreme over all the powers and influences of will or passion, of interest or prejudice, whether of the few or of the many; to render it stable, impartial and equal in its operation, over all who might require its protection or fall under its animadversion. But it appears to us that the principle contended for, would be adverse to all these objects. If a jury has a legitimate authority to decide upon all questions of law arising in the cases before them, and that contrary to the instruction of the judge, in cases where such direction of the judge may be supposed adverse to the views of the law, relied on by the accused or his counsel, they would have the same power to decide any question of law, against the opinion and instruction of the judge, when such opinion is in favor of the accused, and find him guilty, where the judge should direct the jury, that these facts which the evidence conduces to prove, if proved to their satisfaction, would not warrant a conviction. A case may be supposed, at least for the purpose of illustration, where a high popular excitement should arise and become general, in which large bodies of persons might come to be actuated, by feelings of honest but mistaken indignation against some supposed wrong, and earnest in the pursuit of the supposed interests of philanthropy; or perhaps numbers may be influenced by more base, interested and vindictive passions. Under these circumstances, a grand jury, having, as the case supposes, a legitimate and rightful authority to decide on questions of law, contrary to the instructions and charge of the judge, might return an indictment; a traverse jury, in their turn, might convict upon it, though the court before whom it is tried should give them such directions, in point of law, that if they understood and followed them, they must acquit the accused. But the case supposes that the law may be rightfully interpreted, by a jury which may shift at every trial. What then becomes of the security which every citizen is entitled to, by a steady and uniform, as well as impartial

interpretation of the laws and administration of justice, by judges as free, impartial and independent as the lot of humanity will admit? The purpose and intent of these provisions, we think, are indicated by the last article of the declaration of rights, which, after having contemplated a distribution of the powers of sovereignty into legislative, executive and judicial departments, and declared that neither should execute the powers assigned to the other, points out the ultimate object in these emphatic words; "to the end, it may be a government of laws and not of men."

These provisions were adopted as the fundamental laws upon which the government was to be administered; they have a manifest reference to a favorite maxim of the friends of civil liberty, regulated by law, that high powers can be most safely entrusted to public officers, by placing them, when they are capable of distribution, in different departments, to be exercised by concurrent action, so that each shall keep within its own sphere, and the one be a check upon the other. They also regarded another favorite axiom, that facts could be best verified and tried, by an impartial jury, drawn from the vicinity, who should consider and weigh the evidence, and thereupon find and declare the facts; and that a steady, uniform interpretation of the laws and administration of justice, could best be secured, by the establishment of permanent judicial tribunals, as an independent department of government, to whom the judicial power should be entrusted, and who should be rendered, as far as practicable, free and independent.

Whether, therefore, we consider the rules of the common law, or the constitution and law of this commonwealth, we are of opinion that it is the proper province and duty of the court to expound and declare the law, and that it is the proper province and duty of the jury, to inquire into the facts by such competent evidence as may be laid before them according to the rules of law for the investigation of truth, which may be declared to them by the court, and find, and ultimately decide on the facts. It may be added that it is the more necessary to adhere to this rule, in the administration of American law, because in these states the government is conducted according to written constitutions, in which the powers even of the legislature are limited and defined; and it is therefore within the province, and it is made the duty of the judicial department, on proper occasions, to decide not only what is the true interpretation and legal effect of a legislative enactment, but also whether an act, passed with all the forms of legislation, is within the just limits of legislative power, and therefore, whether it is constitutional and valid.

But though this rule of law be considered as well established,

yet as we have already said, there are various modes, in which it must be practically applied, according to the nature of the proceedings in which it arises. Sometimes, even in criminal cases, the question of law arises upon the record, where there is no controverted fact, and where the court decide definitively, as in case of a demurrer, a motion to quash an indictment, a motion in arrest of judgment, on a bill of exceptions, and the like. But it will most frequently arise, in a trial before a jury, upon the question of guilty or not guilty. In every charge of crime, there must be a question of law and a question of fact, to wit, is there any such rule of law as that on which the indictment is founded? has the defendant done the acts charged in the indictment, which amount to a violation of such rule of law, and constitute the offence charged? The decision of both of these is necessarily involved in a verdict of "guilty" or "not guilty." The former affirms that there is such a law, and that the accused has violated it; the latter affirms, either that there is no such rule of law, or, if there is, that the accused has not done any acts which amount to a violation of it.

How, then, are these two questions to be decided and combined into one, if one is to be referred exclusively to the court, and the other to the jury? The jury may, in any case, if they think fit, find a special verdict; that is, they may find and report, in the form of a verdict, all the material facts, which are proved to their satisfaction, and call upon the court to decide, whether in point of law the accused is guilty or not guilty, upon the facts thus found. But this is the privilege of the jury, which they may exercise or not, and in no case are they bound to find a special verdict. *Mayor, &c.* v. *Clark*, (3 Ad. & El. 506.) The question then recurs, in case the jury return a general verdict, how is the law to be decided by the court, when, as we have seen, it is to be declared by the jury, as involved in the general verdict. As both questions are involved in the verdict, the appearance on the record is that both are decided by the jury, because both are declared by them. But this is in appearance only, and can scarcely mislead those who are acquainted with the practice of courts of justice in criminal trials, though it has sometimes led to the argument, that because they must, in a general verdict, declare the rule of law on which it rests, they have a power to pass upon it, and therefore a rightful authority to decide it. But we think the course of proceeding, in such case, is very clear, is quite consistent with the principle before stated, and is constantly practised upon in such trials. It is the only and proper course which can be adopted, in order that the law may be carried into effect, in its spirit and integrity. That

course is, for the judge to direct the jury hypothetically, to declare what the law is, with its exceptions and qualifications, to explain it, and to state the reasons and grounds of it, if, in his judgment, such explanation is necessary to make it clearly intelligible to the minds of men of good judgment and common experience, but without legal knowledge and skill; then to state to the jury, that if certain facts, necessary to constitute the offence, and which there is evidence tending to prove, are proved to their satisfaction, then they are to find the defendant guilty; but if certain material facts, which there is some evidence tending to prove, are not proved to their satisfaction, then they are to find the defendant not guilty.

This is the only mode in which a trial can be conducted, since the jury are not obliged to find a special verdict, and the law confides in the intelligence and integrity of the jury, to understand the rules of law as prescribed to them by the court, to weigh and examine the evidence laid before them, and honestly, according to the conviction of their minds, to find whether they are true, and whether such facts, found true by them, do or do not bring the party accused within the operation of the law, as thus prescribed to them, and to find a verdict of guilty or not guilty accordingly.

But in thus conducting a jury trial in a criminal case, with a view to the return of a general verdict, it is obvious that the whole matter of law as well as of fact must be stated and explained to the jury, so that they may fully understand and apply it to the facts, because, as we have seen, in the form of the general verdict, they do declare the law as well as the fact. For this purpose it seems to be necessary, and in our state it is the usual practice for the parties respectively, by their counsel, to state the law to the jury, in the presence, and subject to the ultimate direction of the judge; because, unless the jury understand the rule of law, with its exceptions, limits and qualification, they cannot know how to apply the evidence, and determine the truth of the material facts necessary to bring the case of the accused within it. In thus presenting their respective views of the law to the jury, under the direction of the court, for the better information of both the judge and jury, great latitude has been allowed in the practice of this commonwealth, and counsel have been permitted to state and enforce their views of the law, especially in capital cases, by definitions, and cases from such works of established authority as the court may approve. In this great latitude has been allowed, in tenderness to the accused, and a liberal confidence reposed in counsel called to defend the accused in the hour of his trial. But such an address, whether it be upon the matter of fact, or the matter of law, and whether in

form it be directed to the court or jury, is in legal effect and actual operation, an address to both, not because they have not several duties to perform, and distinct questions to pass upon, but because it is one trial, carried on at once before court and jury, in which the judge must have a clear comprehension of the nature and scope of the evidence, conducing to the proof of facts, which may or may not render the accused amenable to the law, in order that he may give such directions in matter of law, as the state of the evidence may require; and the jury must have a clear comprehension of the rules of law, in order to determine whether the facts proved bring the accused within them, and because the minds of both judge and jury, acting in their respective departments, must result in that general verdict of acquittal or conviction, which is the appropriate determination of the cause. Considering the latitude which has been allowed in this commonwealth, by a long course of practice, and the difficulty of drawing an exact line of distinction between that full statement and exposition of his views of the law, which counsel may properly make in a general address to the court and jury, upon the questions embraced in the issue, and involved in a general verdict, and an address to the jury separately upon questions of law. We are of opinion, that a party may by his counsel address the jury upon questions of law, subject to the superintending and controlling power of the court to decide questions of law, by directions to the jury, which it is their duty to follow. In ordinary cases such directions to the jury, upon the questions arising in the cause, are not given until the parties by their counsel have submitted their respective views of the law and the facts, in an argument to the court and jury. On the whole subject, the views of the court may be summarily expressed in the following propositions.

That in all criminal cases, it is competent for the jury, if they see fit, to decide upon all questions of fact embraced in the issue, and to refer the law arising thereon to the court in the form of a special verdict.

But it is optional with the jury, thus to return a special verdict or not, and it is within their legitimate province and power to return a general verdict, if they see fit.

That in thus rendering a general verdict, the jury must necessarily pass upon the whole issue, compounded of the law and of the fact, and they may thus incidentally pass on questions of law.

In forming and returning such general verdict, it is within the legitimate authority and power of the jury to decide definitively upon all questions of fact involved in the issue, according to their judgment upon the force and effect of the competent evidence laid

before them; and if in the progress of the trial, or in the summing up and charge to the jury, the court should express or intimate any opinion, upon any such question of fact, it is within the legitimate province of the jury, to revise, reconsider, and decide contrary to such opinion, if in their judgment, it is not correct and warranted by the evidence.

But it is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court, upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matter of law. To this duty, jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner as they are conscientiously bound to decide all questions of fact according to the evidence.

It is no valid objection to this view of the duties of jurors, that they are not amenable to any legal prosecution for a wrong decision in any matter of law; it may arise from an honest mistake of judgment, in their apprehension of the rules and principles of law, as laid down by the court, especially in perplexed and complicated cases; or from a mistake of judgment in applying them honestly to the facts proved. The same reason applies to the decisions of juries upon questions of fact, clearly within their legitimate powers; they are not punishable for deciding wrong. The law vests in them the power to judge, and it will presume that they judge honestly, even though there may be reason to apprehend that they judge erroneously; they cannot therefore be held responsible for any such decision, unless upon evidence which clearly establishes proof of corruption, or other wilful violation of duty.

It is within the legitimate power and the duty of the court, to superintend the course of the trial, to decide upon the admission and rejection of evidence; to decide upon the use of any books, papers, documents, cases or works of supposed authority, which may be offered upon either side; to decide upon all collateral and incidental proceedings, and to confine parties and counsel to the matters within the issue.

As the jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this court are of

opinion that the defendant has a right by himself or his counsel, to address the jury, under the general superintendence of the court, upon all the material questions involved in the issue, and to this extent, and in this connection, to address the jury upon such questions of law as come within the issue to be tried. Such address to the jury upon questions of law embraced in the issue, by the defendant or his counsel, is warranted by the long practice of the courts in this commonwealth in criminal cases, in which it is within the established authority of a jury, if they see fit, to return a general verdict, embracing the entire issue of law and fact.

As it appears by the bill of exceptions, that the defendant's counsel were prohibited from addressing the jury upon questions of law, embraced in the issue, the court are of opinion that the verdict ought to be set aside. And the same is set aside, and a new trial granted, to be had at the bar of the court of common pleas.

This renders it unnecessary to express any opinion upon several other questions raised upon the bill of exceptions.

A. Huntington, district attorney for the commonwealth.
Hallett and *Nelson*, for the defendant.

Circuit Court of Petersburg, Virginia, January, 1847.

COMMONWEALTH *v.* ARCHER.

An enlistment into a volunteer company in the service of the United States, is a contract with the government, and is not binding upon the infant, unless shown clearly to be beneficial to him.

The members of such a volunteer company, although officered and organized by the state authorities, are to be regarded as United States troops, and not as militia in the service of the United States.

In this case, a minor enlisted in a volunteer company, joined with his father in a petition for a *habeas corpus* for his release; and the court ordered him to be discharged.

THIS was a habeas corpus, sued out at the relation of the father, directed to the defendant, as captain of the Petersburg Mexican volunteers, commanding him to bring up the body of George B. Lipscomb, an infant, enlisted in his company. It appeared, on the hearing of the case, that the young man was between twenty and twenty-one years of age; that he had voluntarily enlisted, and

been mustered into the service of the United States; that in the year 1843, he was sent by his father, who lived in King William county, to live with his uncle, in Petersburg, for the purpose of learning the trade of a carpenter; that subsequently, the uncle having discontinued his business, Lipscomb, of his own accord, went to live with a Mr. Post, of Petersburg, a carpenter, with whom he was living at the time of his enlistment; that he enlisted without the knowledge of his father or uncle, but the uncle, on hearing of it, advised him to stick to it; that he has been in the habit of visiting his father's family about once a year since he has lived in Petersburg; and had visited him a few weeks before his enlistment, when the father heard for the first time, that he was living with Post. As soon as the father heard of the enlistment, he came to Petersburg and sued out this writ of habeas corpus. The infant, in answer to questions by counsel, expressed a wish to be discharged, in consequence of the distress of his mother.

The case was argued by *J. S. Edwards*, for the petitioner, and by *Thomas Wallace* and *W. T. Joynes*, for the defendant. On a subsequent day, Gholson, J. delivered his opinion, in substance, as follows:

The case was, in his opinion, to be determined on the principles of the common law, there being, for reasons which he assigned in the course of his opinion, no statute of Virginia or of the United States, applicable to it. The common law is the general law of the land, recognized alike by the general and state governments; and the common law rights of the citizen remain unimpaired, except so far as altered or abridged by some constitutional provision or statute. He fully conceded to congress the right, by statute, to authorize in certain cases within the scope of its granted powers and duties, what the common law or the municipal law of the states might not allow: but there was no inherent right in the general government to disregard them; and all common law rights and disabilities remain until positively taken away. (1 Kent Com. 341.) What then were the rights and capacities of infants at common law? It is well settled at this day, that those contracts of an infant which are positively injurious to him are absolutely void: those which are clearly and certainly beneficial to him, are binding; and those of a doubtful character are voidable at the election of the infant. Within the last class, all those cases fall in which the contract *may* prove beneficial, but in which the benefit is not clear and manifest. (Story on Contracts, §§ 37, 38, 56.) *Keane* v. *Boycott*, (2 H. Black, 511.) The exceptions to these general rules in certain cases, such as executed contracts of marriage after the age of

puberty, the execution of naked trusts, &c., &c., rest upon some clear necessity, or the rights of third persons, or the greater evils that would ensue from a rigid adherence to the general rule. It is also true that whatever an infant is by law bound and compellable to do, he may do voluntarily. (Co. Lit. 172 a.) In *Zouch* v. *Parsons*, (3 Burrow, 1801,) Lord Mansfield illustrates this principle by the case of an infant tenant in common who may make partition; an infant mortgagee, who may release the mortgage after the debt is paid; and an infant executor, whose acts, not amounting to a devastavit, are binding upon him. But "it must be a right act, which he ought to do, and which he is compellable to do."

There is no difference, in the application of these principles, between contracts with individuals and contracts with the government. There is no foundation for any such difference in reason, nor, as far as he had discovered, on authority. *Commonwealth* v. *Hantz*, (2 Penn. R. 333,) tends to show that there is none. He conceded that congress may authorize the enlistment of minors in the public service, and that "statutes passed for that purpose will be emphatically the supreme law of the land," as was held by Judge Story in the *United States* v. *Bainbridge* (1 Mason.) For congress has express power to "raise and support armies," and may exercise all powers "necessary and proper" to carry that power into effect. But as the mode of enlistment is only a means resorted to to accomplish a given purpose, it ought to be distinctly declared by statute before it shall be allowed to change or impair private rights under the common law; otherwise it would require but a slight extension of the doctrine, to claim for the general government, without statute, the power of impressment and conscription in order to raise and support armies. To have that effect, statutes are not only necessary, but must be clear. (1 Kent, 463.) Public duties and obligations should be clearly defined by law, and it would be not only against the rules of the common law, but the principles of our government, to require of the citizen any duty, or withhold from him any privileges not imposed or withheld by the common law, without giving him full notice by public laws.

A voluntary enlistment in the service of the United States is a contract. It was so regarded by Judge Story in *United States* v. *Bainbridge;* by the supreme court of New York, in the *United States* v. *Wyngall*, (5 Hill); and by counsel on both sides in the *United States* v. *Cottingham*, (1 Rob.) In that case, it is true, Judge Baldwin says it wants many of the attributes of a contract, —mutuality, for example; but with reference to that opinion, it seems clear that if an infant, from want of legal capacity, would

not be bound by a contract or engagement reciprocal in its character, *a fortiori* he ought not to be bound by one which does not bind the other party. He could find no case or authority which holds that such a contract is so clearly beneficial to the infant as to be absolutely binding upon him at common law. There is nothing in *Keane* v. *Boycott*, (2 H. Bl. 511,) as strong a case against the infant as any other, to sustain such a doctrine. *The Commonwealth* v. *Murray*, (4 Binney, 487,) was the case of an infant without a father, guardian or master, though his mother was living. The infant there was dependent on himself alone, and his health disabled him from pursuing his trade. But the party now before him was in no such destitution. He was placed by his father with his uncle, and subsequently, with the approbation of the uncle, went to work with a carpenter. The necessaries of life were fully supplied to him, — so that this contract with the government cannot be regarded, as in the case referred to, as a contract beneficial to the infant, because it enabled him to procure the necessaries of life, which he could not or might not otherwise be able to obtain. It is, moreover, very important to observe, that in the present case both the father and minor unite in the petition for discharge. The case of *Commonwealth* v. *Gamble*, (1 Serg. & Rawle,) cited by counsel, he had not been able to see — but it would probably be found to rest on some peculiar ground, showing that the contract was manifestly for the benefit of the infant. It is not denied that any contract made by an infant with the government will bind him as fully at the common law as if made with an individual. If it be in fact manifestly for the infant's benefit, it shall bind him, but it is denied that the common law sanctions any such doctrine, as that a contract shall be presumed to be beneficial to an infant, merely because it is made with the government. It is not denied that congress has the constitutional power to *authorize* the enlistment of minors; and statutes for that purpose may be regarded as not only removing the common law disability of the infant, but as expressing the legislative opinion that contracts of enlistment are beneficial to him — but it is submitted that when the statute is silent (as in the present case) the common law privilege or disability obtains.

In the case of the *United States* v. *Bainbridge*, (1 Mason,) Judge Story seems to concede, throughout, that an express enactment or a clear inference from the statute is necessary to authorize the enlistment of minors in ordinary cases; and Story on Contracts, § 53, clearly implies the same doctrine. The legislation of congress upon this subject seemed also, in his opinion, to have proceeded,

uniformly, upon the admission of the privilege of infants, by the general law, to avoid their contracts of voluntary enlistment. With the highest respect for the learning of Judge Baldwin, he could not concur in the opinion that the provisions of the 11th section of the act of 1802, are not predicated upon any supposed disability of infants. On the contrary, he thought that the prohibition to the recruiting officer imposed by that section, is tantamount to a positive provision as to the manner in which minors may be bound, predicated upon the opinion that, without such a provision, they would not be bound at all; and, as if anticipating that minors enlisted otherwise would be discharged, the recruiting officer is made liable for the value of the clothing which had, in the mean time, been furnished to the recruit thus illegally enlisted. If congress had entertained the opinion that, in the absence of such a provision, minors would have been bound by voluntary enlistment, it would have contented itself, when it meant to authorize the enlistment of minors, by simply repealing the 11th section of the act of 1802. But the acts passed during the last war, which repealed that section, all go further, and provide affirmatively that minors may be enlisted, and some of them provide for compensation to the master in the case of apprentices; and all the acts of congress passed since the first establishment of the navy, expressly authorize the President to employ midshipmen and boys in the naval service. Thus it appears that whenever congress had contemplated the enlistment of infants, it has either made express provision for it, or used language so plain as not to be misunderstood; while at other times, such provisions have been omitted; from which we may justly infer, not only the sense of congress as to the common law, but also that the binding enlistment of infants was not contemplated by the act of May 13, 1846, which has no provision on the subject.

He next inquired whether the party before him was bound and compellable, under the laws in question, to do military service, in such wise as to make his present contract of voluntary enlistment valid and binding, upon the principle cited from Lord Coke. And that inquiry brought up the question, whether the volunteer troops, raised under the act of May 13, 1846, are to be regarded as United States troops, or as militia of the states in the service of the United States. Several provisions in the act of May 13, 1846, clearly indicate that these troops are not to be regarded as militia. The volunteers are to "serve twelve months or to the end of war;" the militia "are to serve not exceeding six months in any one year." The volunteers are to "furnish their own clothes, and, if cavalry, their own horses and horse equipments" — "are subject to the rules

and articles of war, and shall be in all respects, except as to clothing and pay, placed on the same footing with similar corps in the United States army;" and are in many other respects, clearly distinguished from the great body of the militia spoken of in the act. The duties required of these troops are duties which cannot be required of the militia, — for the militia can only be called out, under the constitution, to "execute the laws of the Union, suppress insurrection, and repel invasion" — while these volunteer troops are raised for service in a foreign land and in an aggressive war. The fact that these troops are officered and organized by the state authorities, does not change their character. Congress might well employ the agency of the state authorities, in its discretion, in the execution of its laws. And such, he thought, was the office of the authorities of the states, in the organization of these troops. They are as much United States troops, to all intents, as if raised by a recruiting officer and commissioned by the president.

The liability of the infant to be called into service as a militia man, is contingent, because the selection is by allotment. This is so in respect to volunteer companies which are required by the militia laws of Virginia to be called out by companies. The performance of military duty might or might not be required of any particular one — and is not an act which an infant is clearly compellable to do, within the meaning of the principle referred to. He stated that he was sustained in this view of the character of these troops, by the decision of the governor and council lately announced in the newspapers, that the officers of the Virginia regiment are not required to take the anti-duelling oath, prescribed by the laws of Virginia to all officers under the state. He also referred to the California regiment of Col. Stevenson, which was enlisted under the act of May 13, 1846, in like manner as these troops, and independently of the act of 1802, which provides for filling up the rank and file of the peace establishment by *individual* enlistment — he perceived no legal difference between the character of these troops, and that of those which have been raised in Virginia, — and he believed it certain that many persons were discharged from that regiment on the ground of infancy.

If this application had rested on the petition of the father alone, without the concurrence of the minor, the judge stated that he should probably have remanded the prisoner. But here the minor concured in the petition of the father, (a fact which distinguished this from some of the cases in the books which otherwise had some resemblance to it,) and he must, therefore, discharge him.

Digest of American Cases.

Selections from 2 Washburn's (Vermont) Reports.

ACTION.

If the husband appoint an attorney to receive the money upon his wife's *chose in action*, and the attorney actually receive the money, the wife cannot join with the husband in a suit to recover the money from the attorney, but the husband must sue alone. *Hull et ux.* v. *Royce*, 190.

ACTION ON THE CASE.

If, under a declaration in trespass on the case, alleging that the defendant falsely warranted a horse to be sound, knowing him, at the time of making the warranty, to be unsound, the plaintiff prove a representation by the defendant of soundness, which, at the time of making it, the defendant knew to be false, it is sufficient to entitle the plaintiff to a verdict. *West* v. *Emery*, 583.

2. And if, in such case, the declaration allege an *absolute* representation of soundness, and a *scienter* by the defendant of its falsity, and the proof shows that the representation by the defendant was, that the property was sound, "so far as he knew," and the plaintiff also prove that the defendant in fact knew, at the time of making the representation, that the property was unsound, this will be no variance, — since a representation of absolute soundness and a representation qualified as above, which the defendant, at the time of making it, knows to be false, bind the defendant to the same extent. *Ib.*

AGENT.

An agent is only bound by the instructions of his principal as he understood them, unless there was fraud, or some fault on his part, in not comprehending them; and he will not, in the absence of all proof, be presumed to be in fault in not comprehending oral instructions to their full extent. *Pickett* v. *Pearsons*, 470.

ARBITRATION.

Where the parties agreed to change farms, and submitted to appraisers, to determine the amount which should be paid as the difference between them, and it was provided in the submission that the value of the orator's farm should be called $5000, and that, if, in the opinion of the appraisers, the orator's farm was overvalued, or undervalued, the defendant's farm should be valued in the same proportion, and the appraisers, in making their award, ascertained the *real value* of the farms, and hence deduced the difference to be paid, without regard to the value fixed for the orator's farm in the submission, it was held that the award was void, as not having followed the submission, and would be set aside by a court of equity. *Howard* v. *Edgell et al*, 9.

ATTACHMENT.

An officer, when serving a writ and attaching property, acts as the agent of the plaintiff; and when the parties to the writ have dissolved the attachment by settling the suit, the officer has no farther lien upon the property attached, and has no right to retain it in his hands as security for his services. *Felker* v. *Emerson*, 101.

2. If one, specially deputed to serve a writ of attachment, be about to make service of the process by attaching thereon, as the property of the defendant, property which belongs to a third person, and in which the defendant has

no attachable interest, it will not be lawful for the real owner of the property to resist the making of such attachment. *State* v. *Buchanan et al.* 573.

AUDITA QUERELA.

Audita querela will not lie, to affect a judgment rendered by a justice of the peace, when the matter of the complaint would be proper subject for a writ of error; and it makes no difference that the right to bring a writ of error, in such case, has been taken away by statute. *Spear* v. *Flint*, 497.

BAILMENT.

If property be bailed for a specified time, and, before the term expires, the bailee destroy the property, the bailor may sustain trover against him for its value. *Morse* v. *Crawford*, 499.

BANKRUPTCY.

Where a surety executed, with his principal, a note payable in one year after its date, and, after the note became due, the principal obtained his discharge in bankruptcy, under the Act of Congress of Aug. 19, 1841, and the surety did not prove his contingent claim against the principal under the commission, under sect. 5 of the bankrupt Act, and, after the principal had obtained his discharge, the surety paid the note, it was held that the discharge in bankruptcy was no bar to an action in favor of the surety against the principal, to recover the money so paid. *Wells* v. *Mace et al. and Tr.* 503.

2. The moral obligation resting upon a bankrupt to pay his debts, which were contracted prior to his discharge in bankruptcy, is a sufficient consideration for a new promise, after the discharge, to pay such debt. *Farmers & Mechanics* v. *Flint*, 508.

3. Such new promise may be proved by parol evidence. *Ib.*

4. And it seems that it is unnecessary to declare upon the new promise. But if this be necessary, yet if the plaintiff has declared upon the original contract, and has replied a new promise to the defendant's plea of bankruptcy, and the defendant has traversed the fact of such new promise, judgment will not be arrested, — since the replication is not a departure in pleading, nor is the issue, thus formed, immaterial. *Ib.*

5. The courts of this state have jurisdiction of questions as to the effect of a discharge in bankruptcy, obtained from the district court of the United States under the Act of Congress of Aug. 19, 1841, upon judgments and contracts which might have been proved under the commission. *Comstock* v. *Grout*, 512.

6. A judgment in an action of tort, recovered against one who afterwards files his petition in the district court to be declared a bankrupt, is provable under the commission, and is barred by the final discharge of the defendant as a bankrupt. *Ib.*

BOOK ACCOUNT.

The firm of F. & S. having an account against W., F. sold out his interest in the property and demands of the firm to E., and E. entered into partnership with S., and the business was conducted under the firm of E. & S.; after this and after E. & S. had ceased transacting business as partners, W. examined his account upon the books of F. & S., and admitted it to be correct, and consented that it might be charged to him upon the books of E. & S., and it was accordingly so charged; and it was held that E. & S. might, in an action on book account in their own names against W., recover the amount thus transferred from the books of F. & S. *Eaton et al.* v. *Whitcomb*, 641.

CHANCERY.

An answer, responsive to the bill, and not asserting a right *affirmatively*, in opposition to the right claimed in the bill and independent of it, is proof of the facts stated in the answer. *Allen, Adm'r.* v. *Mower*, 61.

2. But, if the answer assert matter *affirmatively*, though it be responsive to the bill, *quære*, whether, upon a traverse, the answer shall be received as proof, or as mere pleading requiring to be proved. BENNETT, J. *Ib.*

3. A decree of foreclosure, by a court of chancery, cannot be proved by the docket minutes of the court merely; the decree itself, as drawn up and signed, or a copy of the record, if it have been enrolled, is the only legitimate evidence of the decree. *Austin* v. *Howe*, 654.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT. Vol. 17. New Series. By PETER T. WASHBURN, Counsellor at Law. Vol. II. Woodstock: Published by Haskell & Palmer. 1846.

This volume is prepared with great care and accuracy. The arguments are very fully and very well reported. The marginal abstracts are generally correct and well expressed. They lack somewhat the legal terseness which the best models exhibit, and some of the abstracts might well be omitted. But they are far superior to the abstracts of most reporters.

The decisions display a very creditable vigor of mind and extent of legal attainments. As literary productions they are only entitled to a moderate degree of praise, inasmuch as they occasionally exhibit a negligence in the use of language not creditable in a written decision of the highest tribunal of a state. The great majority of the cases seem to us rightly decided, and also for the right reasons. The court is to be highly praised for seldom rambling far from the case before them. To some of the decisions, however, we cannot bring our minds to assent. In *Carpenter* v. *Sawyer*, p. 121, a sale of land for non-payment of taxes was held bad, because in making up the record of the prior proceedings as required by law, the officer used copies of the documents to be recorded, (which he knew from personal examination to be correct,) instead of copying from the originals. This is an instance of a wrong application of a right principle. In *Kirkaldie* v. *Paige*, p. 256, and in *Deming* v. *Lull*, p. 398, the dissenting opinions seem to be the better opinions. In *Gordon* v. *Potter*, p. 348, there is a very able opinion, in which the court controvert the doctrine laid down in 2 Kent's Commentaries, 191, and decide that a parent is never liable at common law for supplies furnished to a son, unless they are furnished by his consent, express or implied. In *Morse* v. *Crawford*, p. 499, the third marginal abstract is too broad. The court were speaking, when they used the words which the reporter has copied, of opinions of witnesses as to the sanity of any persons. We do not think that they meant to say that in all cases a witness can give his opinion. Even with this limitation, the doctrine is questionable. Without it, it would be intolerable. We are less satisfied with the decision in *State* v. *Buchanan*, p. 573, than with any other case in this volume. The court held, that for A. to resist a specially deputed officer, who under a precept to attach the property of B. had taken the property of A., was an indictable offence, as resistance to a precept of law, and this, although the officer knew that the property belonged to A. and not to B., and although the precept was sued out *fraudulently, and for the mere purpose of taking the property of A. so as to squander it, and the officer was a participant in the fraud.* If this is law in Vermont, it reflects but little credit on the efficiency of their legal tribunals there.

In deciding *Denison* v. *Tyson*, p. 549, the court tell a good story respecting contracts in the form of promissory notes, but payable in specific articles, which in Vermont, and in some parts of Canada, are treated as *promissory notes*. It seems that a new judge in Canada had resolutely, but in vain, set his face against the doctrine. "The

worthy and learned justice of the king's bench finally exclaimed *in furore*, and almost in despair, that he thought it was asking too much, that this court should sit all day, to determine the amount of damages to be assessed upon a "*promissory note! for two middling, likely, young calves.*"

A Treatise on the Law of Evidence. By Simon Greenleaf, LL.D., Royall Professor of Law in Harvard University. Vol. I. Third edition. Boston: Charles C. Little and James Brown. London: A. Maxwell & Son, 32 Bell Yard, Lincoln's Inn. 1846.

Mr. Greenleaf's Treatise on Evidence is probably the most successful American law book ever published. In simplicity of method, clearness of statement, and purity of style, it has scarcely an equal among scientific works; whilst all the positions are illustrated by copious learning, which establish without concealing the doctrines in the text. Mr. Greenleaf never drags in authorities to prove his own learning or research, and he never leaves a position uncovered for the want of an apposite citation. As a text-book for students, his work is invaluable, and the demand for it among practitioners is getting to be universal. In the advertisement to the third edition, now published, the author says the work has been thoroughly revised and corrected, and all the recent decisions in England, Ireland, and America, which seemed to affect the text, have been referred to; and the work has been enlarged by considerable matter, which the author hopes will increase its usefulness both to the student and to the profession.

The Lives of the Lord Chancellors and Keepers of the Great Seal of England. From the earliest times till the reign of King George IV. By John Lord Campbell, A. M., F. R. S. E. First series, to the Revolution of 1688. In three volumes. From the second London edition. Philadelphia: Lea and Blanchard. 1847.

We are glad to see this handsome reprint of a work which has been received with uncommon favor in England, having rapidly passed to a second edition. The work has been so generally noticed in periodical publications, quarterly, monthly, weekly, and daily, that we deem it unnecessary to do more than announce its republication here — trusting that we may be able to refer to it hereafter more at length.

NEW BOOKS.

Encyclopædia Americana. Supplemental volume. A popular Dictionary of Arts, Sciences, Literature, History, Politics, and Biography. Vol. XIV. Edited by Henry Vethake, LL. D. Philadelphia: Lea & Blanchard. 1847.

A Treatise on the Practice of the Supreme Court of the State of New York. By David Graham, Counsellor at Law. Third edition, revised, corrected, and enlarged. In two volumes. Vol. I. New York: Gould, Banks & Co., Law Booksellers, No. 144 Nassau street; and Gould, Banks & Gould, No. 104 State street, Albany. 1847.

A Treatise on the Law of Principal and Agent, chiefly with reference to Mercantile Transactions. By William Paley, of Lincoln's Inn, Esq., Barrister at Law. The third edition, with considerable additions. By J. H. Lloyd, of the Inner Temple, Esq., Barrister at Law. Third American edition, with further extensive additions. By John A. Dunlap, Counsellor at Law. New York: Banks, Gould & Co.; Albany: Gould, Banks & Gould. 1847.

Intelligence and Miscellany.

NEW CONSTITUTION OF NEW YORK. — We have thus far given no account of the convention for the amendment of the constitution of New York; or of the somewhat remarkable changes in the policy of that great state, as indicated in the new constitution which has been accepted by a large majority of the people. We shall refer to this subject at length hereafter, and may be able to form a clearer judgment in the premises now that the heat and smoke of the contest have subsided. Meanwhile, we notice that a meeting of the Bar has recently been held in New York, at which George Wood presided, and Francis B. Cutting stated the object of the meeting. He was opposed to the constitution, but now that it had been adopted by the people and would soon be the law of the land, he thought it was the duty of the profession to lend their aid to the legislature in defining the true character and interpretation of the laws under it. He then offered the following resolution:— *Resolved*, That a committee of thirteen be appointed, to take into consideration and report at a future meeting, what services (if any) the Bar of this city could render, in carrying into wise and successful operation the judiciary system under the new constitution.

James T. Brady moved to amend the resolution by adding "that the committee be requested to communicate with such other committees as might be appointed in other counties," etc. He did not think the action of this bar should be confined to the local courts of this city, as the court of appeals and supreme court were of far greater importance; and in regard to these, it would hardly be respectful to the bar of the state, to act without their coöperation.

Hugh Maxwell suggested that it would not be necessary to prescribe the duties of the committee, as it was their province to recommend such action as they might think proper, which would be considered at a future meeting.

H. S. Dodge was informed lately, by a senator, that it was in contemplation to appoint commissioners to make a code of practice early in the next session of the legislature; and that it would be well to have this committee confer with such commissioners.

H. P. Hastings did not think it of much consequence whether the resolution was amended as proposed, or not. The only important question for such committee to act upon was whether the principles adopted by the new constitution, in reference to the court of appeals and supreme courts, should be extended by the legislature to the local courts of this city. The question whether the judges of these courts are to be elected by the people, or in some other mode, was not settled by the constitution, owing to the exertions of interested parties.

Mr. Sedgwick. It is settled by the constitution that they are to be elected. Art. vi. § 18. "All judicial officers of cities and villages, and all such officers as may be created therein by law, shall be elected at such times and in such manner as the legislature may direct."

The resolution was unanimously adopted. The following gentlemen were appointed to act as said committee: John Duer, Charles O'Connor, Jonathan Miller, J. P. Hall, James T. Brady, Theodore Sedgwick, John Bigelow, E. C. Benedict, F. B. Cutting, John Hanson, Edward Sandford, J. L. White, E. P. Hurlbut.

ENLISTMENT OF VOLUNTEERS.— The case of *Commonwealth* v. *Archer*, in our present number, will be found to be of general interest. The opinion was originally published in a Virginian newspaper, which was sent to us with another containing a review of the decision.

The latter we have unfortunately mislaid. While these sheets were passing through the press, a case has been elaborately argued before the supreme court of Massachusetts, wherein chief justice Shaw delivered an opinion to the effect that the Massachusetts regiment of volunteers for the Mexican war are not militia, but a distinct species of military force, which congress have the constitutional power to call into service; that the foundation of their obligation to serve is their own contract of enlistment; that, under the act of May, 1846, the enlistment of a minor is not binding without the consent of his parent, master, or guardian; and that the legality of the organization of the companies cannot be objected to by a petitioner, on the summary process of habeas corpus.

Notch-Pot.

It seemeth that this word *Notch-pot*, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 178 a.

A committee recently appointed to examine a candidate for admission to the bar, by the district court of Iowa, sitting at Bloomington, presented a report which we should be glad to print entire if we had room. After stating some of the qualifications which should be a prerequisite for admission, they say; "A weak impatience is ever prompting inexperienced men to attain rank and station without performing the labor requisite for their achievement. Some short road to wealth, some 'royal road to knowledge,' is always sought with avidity, and when the imbecile but ambitious mind is taught by the polished pen of a Wirt, that a good lawyer was once made without human labor from rather coarse and forbidding material, it is fired with a kind of puerile ambition for distinction in the same way. The undersigned are of opinion that Wirt's Life of Patrick Henry has done more towards the destruction of the usefulness of young men in the United States by throwing them out of their proper sphere, than any other one cause to which loafism can be traced." They then allude to the great desire to get into the profession, and say, that "such are the facilities for admission, and such the rush for the bar from all trades, callings, professions, and occupations, as well as from a still more numerous class of men who have no trade, calling, profession or occupation at all, that it would seem that the genius of law had appeared to the great mass of mankind, and commanded them with magisterial authority to leave all that they had and follow him." In conclu-

n, they recommend, among other things, that every person admitted to the bar "be required to give a bond for his good professional behavior in the sum of —— dollars, renewable every five years; and that the same provision be extended to all who now are, as well as to those who may hereafter in any manner become members of the bar."

An interesting letter from Hon. Henry Wheaton on the Law Schools in Germany, addressed to the National Institute at Washington, has lately been published in the National Intelligencer. It appears that the average number of law students in the university of Berlin is about five hundred annually. The law faculty in the university of Heidelburg, in the Grand Duchy of Baden, ranks next to that of Berlin, if indeed it may not be considered as equal to the latter in the reputation of its professors and the advantages it offers to the students, whose annual number is about the same. The name of MITTERMAIER alone would be sufficient to reflect lustre on any law school. The regulations for the discipline of the students, and relating to the studies to be pursued by them, are similar to those of Berlin. The professors are recruited from all the different universities throughout Germany, and it so happens that not one of the present four ordinary professors in the law faculty of Heidelburg is a native of the Grand Duchy of Baden. The law faculties in the other German universities (except those of Austria) are subject to regulations similar to those of Berlin and Heidelburg. The most important of these law faculties are the following: Munich, which has 14 professors and 400 students; Leipzig, 17 professors and 350 students; Bonn, 15 professors and 230 students; Goettengen, 14 professors and 200 students; Tubingen, 12 professors and 160 students; Breslau, 12 professors and 150 students. All these law faculties are characterized by the same spirit of free competition, among the different teachers and the different schools, which has contributed so much to the progress and present flourishing state of law science in Germany.

The personal estate of the late Chief Justice Tindal was valued, on the probate of his will, at £47,000. His will was made in September, 1842. He devised certain freeholds at Chelmsford and Aylesbury to his eldest surviving son, Louis Symonds Tindal, and his only other son, Charles John Tindal; and directed his executors and trustees to dispose of and convert into money the rest of his freeholds, with all manors and hereditaments and all other estates, real, leasehold, or personal. He bequeathed to his daughter, Merelina, wife of J. W. Bosanquet, (one of his executors,) a legacy of £2000, having amply provided for her on her marriage; directed his executors to invest £8000 for the widow of his son Nicolas, and their two infant daughters, and also made provision for other members of his family; left legacies to his servants, and by his codicil, made in February last, left to his housekeeper, who had been thirty years in his service, an annuity of £40. The residue of his property of every description to be equally divided between his two sons.

In North Carolina, Edward Stanley has been chosen attorney general of the state for the constitutional term of three years. In South Carolina, J. J. Caldwell has been chosen chancellor in place of Governor Johnson. In Pennsylvania, Benjamin Champneys has been appointed attorney general in place of John M. Read, resigned. In Maryland, John Johnson has been appointed chancellor in place of Chancellor Bland, deceased.

In the legislature of Massachusetts a movement has been made to establish the office of attorney general. It is time. We trust, that something will be done to establish a city court in Boston.

The Springfield Post contains a highly complimentary notice of Judge Colby, who held the late term of the court of common pleas in Springfield.

J. P. Robinson, Esq., of Lowell, informs us that the native place of the late J. P. Rogers, Esq., of Boston, was Wakefield, Stafford county, N. H.

We are again obliged to omit several articles for want of room; among them an able opinion by Judge Dewey, of the supreme court of Massachusetts, in the case of *Ward* v. *Jenkins*.

Obituary Notices.

Died, in New Orleans, December 10, Hon. Francis Xavier Martin, aged 84. Judge Martin was one of the most remarkable men in our profession, of the age. His varied fortunes partake of the character of romance, whilst his great energy, unquestioned integrity, industry and ability, have rendered him one of the most conspicuous jurists in our country. He was born in Marseilles, France, March 17, 1762, and left the paternal roof while a lad, with four hundred francs in money as his sole patrimony. He rambled about the West Indies, and finally reached North Carolina. There his money was exhausted, and to avoid starvation he got a place as apprentice to a printer. After three years service he was received a journeyman and became entitled to wages. So well did he manage his affairs, that in three years he had laid up money enough to buy out his employer. Some years afterwards he came to Louisiana. There while a Judge of the Supreme court, he was also partner of a brick yard. After seven years his partner in the brick yard died. In settling their partnership accounts it became necessary to examine their books. It was found that every item of their joint household expenses was marked down from day to day, and that for the whole seven years they had shared the same table together, they had each expended on an average only twenty-five cents per day; including food and clothing for their servants and all the other expenses of house-keeping. During all this time the Judge was receiving a salary of $5000 per year, besides large profits from the brick yard; and from his rents, and money placed at interest, his 400 francs increased to nearly as many thousand dollars and upwards! He lived a very poor man, and died a very rich one. During the third of a century he held office, he had to decide upon immense interests submitted to he Court, and no one ever supposed that for millions of money his opinions could be made to swerve a hair's breadth. His integrity was above the slightest suspicion from any quarter.

On the occasion of Judge Martin's death, a meeting of the New Orleans bar was held, at which the Hon. George Eustis presided, and Felix Grinell Esq. was appointed Secretary. Suitable resolutions were offered by Charles Watts, Esq. and unanimously adopted. J. Whightman Smith Esq., in recording the resolutions, made the following interesting remarks:

"*Mr. Chairman:* The name of the deceased is intimately connected with the judicial history of Louisiana. Whether we regard him as the friendless and orphan boy of fifteen, thrown upon the shores of North Carolina, and there earning a scanty subsistence as a printer's apprentice: or as the historian of the old North State, and the reporter of her judicial decisions; or as a judge of the Mississippi territory: or as a judge of the territory of Orleans; or as the first Attorney General of the State of Louisiana; or as a Judge of her Supreme Court, or as the author of a valuable history of this State; or as the reporter of twenty volumes of our judicial decisions — his career has ever been remarkable for industry, perseverance, integrity and devotion to judicial pursuits. As a Judge of the Supreme Court of this State, for thirty years — a longer period than that of any of his colleagues on the Bench — for nearly one third of that time its presiding Judge — he has always secured the esteem and respect of his fellow-citizens, and has built up a reputation second to that of no jurist in the country as a civilian, and as profoundly versed in the science of international law. His decisions will long be remembered as models of brevity, clearness, learning and justice. He always seized the guiding principle of a cause, and never lost sight of it in

the masses of the evidence, or the discussions of the bar. He seldom differed from his colleagues, but when he did so, his views were presented with a cogency that was hardly to be resisted. In one remarkable instance, he had the good fortune to find his dissenting opinion adopted by the supreme court of the United States. His firmness was ever conspicuous on the Bench. He knew not what it was to shrink from the discharge of any duty, however unpleasant. Fear was unknown to him. Nor could he be moved by appeals to the passions or the prejudices. Impassable as his marble bust which adorns the hall of the supreme court, he followed no guide but the eternal principles of justice implanted in his own bosom, or which he dug from the rich mines of Roman, Spanish, French or English jurisprudence.

One of the pioneers of Louisiana law; one of the legal veterans of the old school; the ripe scholar and jurist, to whom the mysteries of the Pandects, the Partidas, the Recopilacion, the ordinances of Spain and of France were familiar as household words; the companion of Mathews, Lewis, Livingston, Derbigny, Moreau, Lislet, Porter, Morse, Brown, Livermore and Workman — his loss will be deeply deplored by all who feel an interest in the progress of legal science or in the proper administration of justice; and by none more than his brethren of this bar, who have so often witnessed the efforts of his giant intellect."

In Washington, (D. C.) January 12, Hon. Isaac S. Pennybacker, one of the senators from Virginia, aged 41. He was a native of Shenandoah County, Virginia. He was early admitted to practise law and soon attained a high reputation. After representing his district in congress, he was appointed District Judge of the United States for the Western District of Virginia, from which station of honor and influence he was transferred to the senate of the United States. His death was announced in the senate in a feeling and appropriate manner by Mr. Archer, and in the House by Mr. McDowell.

In Baltimore, Md. December 29th, Hon. Alexander Barrow, a member of the senate of the United States, from Louisiana, aged 45. He was a native of Tennessee, where he studied law and was admitted to practice. He removed to Louisiana, where he pursued his profession for some time with success, but being independent in his circumstances, and fond of agricultural pursuits, after a few years' practice he retired from the bar and became a successful planter, and has since devoted his attention mainly to the cultivation of the earth. He served, however, repeatedly in the legislature of Louisiana with reputation, and was regarded as a distinguished member; and he received from the people of the state many other proofs of their respect and confidence. He was a highly popular member of the senate, and when his death was announced, most ample testimony of affection and respect was offered by distinguished men of both political parties.

In Boston, on the morning of January 14, Hon. John Davis, aged 86. No man in our own community had acquired a stronger claim to the respect and gratitude of the profession than the deceased, by a long period of service as a learned, able and upright judge. He filled the important office of United States District Judge, for the district of Massachusetts, for a period of more than forty years, having been appointed to that office by John Adams. He was distinguished in the various relations of life, as an amiable man, an excellent citizen, and an active member of many of our useful institutions. He was in particular a very efficient member of the Massachusetts Historical Society, and for many years its president. We hope to be able to present to our readers hereafter a sketch of Judge Davis, in which some justice may be done to his character and virtues.

In Bangor, Me. January 18th, Peleg Chandler, Esq., Counsellor at Law, aged 73. He was born in New Gloucester, in Cumberland county, a few miles from Portland, to which place his father, Peleg Chandler, had removed from Duxbury, Massachusetts, with the earliest settlers of the former town. The deceased was graduated at Brown University in 1795. He was a class-mate and room-mate through his college course with the present chief justice of Maine. Having completed his professional studies with General Fessenden, of Portland, (then engaged in an extensive practice in New Gloucester,) he established himself in Danville. He soon removed to his native town, where he remained until 1826, when he went to Bangor, then a comparatively small village. He remained there until his death. He was engaged in a large business for twenty years, but for a few years past he had been gradually retiring from the profession, and for several months his strong and vigorous constitution was evidently breaking up. He died in the bosom of his family, surrounded by his children and grand-children, and under circumstances of the highest consolation to those who survive him. His death was announced in the district court by Gov. Kent, who prefaced the resolutions of the bar in a beautiful tribute to the character and virtues of the deceased, who was the oldest member of the Penobscot bar. In accordance with his own wishes, repeatedly expressed, the body of Mr. Chandler was removed to New Gloucester, and deposited by the side of his father by his three sons, all of whom are members of the profession, having pursued their studies in the office of the deceased.

In Delaware, Hon. Daniel Rodney, aged 82. During his life, Mr. Rodney filled many offices of honor and trust in his native state. He was many years a judge of the court of common pleas, then governor of the state. He was also a member of the house of representatives of the United States and of the senate. In 1827, he withdrew from public life.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Allard, James M.	Boston,	Cabinet Maker,	Dec. 21,	Bradford Sumner.
Allen, John,	Medford,	Laborer,	Oct. 16,	S. P. P. Fay.
Allen, Amos,	Dover,	Mason,	May 11,	James Richardson.
Ambrose, Goodhue,	Boston,	Broker,	Dec. 9,	Bradford Sumner.
Arnold, James,	Boston,	Gentleman,	" 15,	Ellis Gray Loring.
Atterbury, John,	Somerville,	Brickmaker,	Sept. 2,	S. P. P. Fay.
Averile, Aaron P.	Topsfield,	Cordwainer,	Dec. 7,	David Roberts.
Bacon, Harlow,	Foxborough,	Housewright,	" 23,	James Richardson.
Banks, George W.	Boston,	Trader,	" 14,	Ellis Gray Loring.
Bemis, Lewis,	Waltham,	Cordwainer,	Aug. 25,	S. P. P. Fay.
Belcher, Warren,	Randolph,	Yeoman,	Dec. 26,	Aaron Prescott.
Belcher, John, Jr.	Randolph,	Boot Manufacturer,	" 30,	Aaron Prescott.
Benton, Soren,	Adams,	Yeoman,	" 3,	Franklin O. Sayles.
Bigelow, Rufus,	Boston,	Stable Keeper,	" 14,	George S. Hillard.
Bigelow, John P.	Boston,	Watchmaker,	" 19,	Willard Phillips.
Blake, William,	Cambridge,	Merchant,	" 1,	George S. Hillard.
Bowers, Ferdinand H.	Boston,	Trader,	" 17,	Ellis Gray Loring.
Brandon, William,	Boston,	Housewright,	" 28,	George S. Hillard.
Braynard, John H.	Boston,	Mason,	" 23,	Ellis Gray Loring.
Braley, Jerome B.	New Bedford,	Laborer,	" 14,	Oliver Prescott.
Briton, Thomas,	Chelsea,	Express Wagoner,	" 31,	Bradford Sumner.
Bruce, Christopher,	Malden,	Cordwainer,	" 24,	George W. Warren.
Bumpus, Allen,	Rochester,	Laborer,	" 22,	Zechariah Eddy.
Burbank, Newde R.	Dracut,	Painter,	Nov. 19,	Josiah G. Abbott.
Caswell, George W. et al.	Boston,	Tin Plate Worker,	Dec. 8,	Bradford Sumner.
Carpenter, Seth P.	Milford,	Boot Manufacturer,	" 1,	Henry Chapin.
Chamberlain, Samuel,	Charlton,	Yeoman,	" 24,	Chas. W. Hartshorn.
Chase, Davis,	Dennis,	Mariner,	" 7,	Zena Scudder,
Cooley, Aaron, Jr.	Boston,	Truckman,	" 10,	Bradford Sumner.
Corwin, Phineas F. et al.	Manchester,	Railroad Contractor,	" 25,	Walter A. Bryant.
Collins, Benjamin,	Boston,	Housewright,	" 14,	George S. Hillard.
Collier, Ira H.	Boston,	Machinist,	" 2,	Ellis Gray Loring.
Coggeshale, Joseph,	Sutton,	Merchant,	" 19,	Isaac Davis.
Collins, Richard,	Springfield,	Trader,	" 23,	E. D. Beach.
Clark, Harvey,	Canton,	Trader,	June 22,	James Richardson.
Clement, Cyrus et al.	Boston,	Merchant,	Dec. 14,	George S. Hillard.
Crombie, Benjamin,	Boston,	Master Builder,	" 21,	Bradford Sumner.
Crawford, William A.	Worcester,	Erector of Lightning-rods,	" 10,	Henry Chapin.
Cross, William,	Boston,	Tailor,	" 30,	Ellis Gray Loring.
Crumby, Benjamin,	Manchester,	Cordwainer,	" 1,	John G. King.
Currier, Joseph W.	Boston,	Gentleman,	" 12,	Bradford Sumner.
Cummings, Samuel R.	Boston,	House Carpenter,	" 14,	Bradford Sumner.
Cummings, Joseph H.	Westford,	Trader,	" 22,	George W. Warren.
Curtis, Samuel D.	Boston,	Ship Carpenter,	" 29,	Bradford Sumner.
Derby, Samuel A.	Boston,	Housewright,	" 8,	Bradford Sumner.
Dow, Stephen S.	Georgetown,	Cordwainer,	" 15,	David Roberts.
Dunning, J. F. et al.	Boston,	Trader,	" 12,	Bradford Sumner.
Durant, Daniel,	Rochester,	Mariner,	" 8,	Z. Eddy.
Edgerton, James et al.	Danvers,	Trader,	" 26,	John G. King.
Emerson, Robert R.	Danvers,	Victualler,	" 8,	David Roberts.
Estes, James F.	Worcester,	Pumpmaker,	" 9,	Isaac Davis.
Fisher, Mason,	Fall River,	Baker,	" 18,	C. J. Holmes.
French, George W.	Randolph,	Trader,	" 17,	Sherman Leland.
Fuller, Charles,	Franklin,	Housewright,	April 13,	James Richardson
Fuller, William,	Framingham,	Innholder,	Dec. 10,	George W. Warren
Gates, Israel,	Boston,	Housewright,	" 10,	Bradford Sumner.
Gillett, David W. et al.	Athol,	Railroad Contractor,	" 25,	Walter A. Bryant.
Glidden, John,	Boston,	Gentleman,	" 30,	Bradford Sumner.
Gleason, Jonathan E.	Boston,	Housewright,	" 19,	George S. Hillard.
Goodnow, Joseph W.	Framingham,	Stabler,	Aug. 17,	S. P. P. Fay.
Goodwin, Henry C.	Boston,	Printer,	Dec. 7,	Bradford Sumner.
Goodwin, Enoch,	Boston,	Trader,	" 3,	George S. Hillard.
Greeley, Andrew G.	Medway,	Merchant.	" 14,	Sherman Leland.
Hall, Leander C.	Boston,	Trader,	" 28,	Bradford Sumner.
Hamilton, Benjamin,	Cambridge,	Painter,	Aug. 1,	S. P. P. Fay.
Hamlet, William et al.	Boston,	Printer,	Dec. 16,	George S. Hillard.
Haskell, Thomas, Jr.	Boston,	Engraver,	" 31,	George S. Hillard.
Harrington, Stephen S.	Westboro',	Boot Manufacturer,	" 2,	Henry Chapin.
Hams, Samuel,	Roxbury,	Trader,	" 11,	D. A. Simmons.
Hayden, Elbridge,	Quincy,	Blacksmith,	" 16,	Sherman Leland.
Hayes, Edmund,	Cambridge,	Brickmaker,	" 12,	S. P. P. Fay.
Hayes, Oliver P.	Chelsea,	Carpenter,	" 1,	George S. Hillard.
Hemes, Frederick W.	Boston,	Confectioner,	" 10,	Bradford Sumner.
Herbon, Michael L.	Boston,	Bargeman,	" 9,	Bradford Sumner.
Hill, Joseph S. et al.	Framingham,	Trader,	" 14,	Josiah Adams.
Holmes, Zaccheus,	Wareham,	Yeoman,	Nov. 21,	Z. Eddy.
Hoogs, John B.	Waltham,	Baker,	Aug. 18,	S. P. P. Fay.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
House, Timothy,	Boston,	Engraver.	Dec. 31,	George S. Hillard.
Hoxse, Benj. B. et al.	Northampton,	Tanner,	" 28,	Ithamar Conkey.
Hurd, William,	Newton,	Paper Maker,	" 29,	S. P. P. Fay.
Hyde, Ebenezer,	Newton,	Mason,	" 7,	S. P. P. Fay.
Hyde, Daniel et al.	Lynn,	Housewright,	" 21,	John G. King.
Johnson, Francis,	Lowell,	Tin Plate Worker,	" 10,	Josiah G. Abbott.
Kelley, Jasper,	Boston,	Merchant,	" 7,	Bradford Sumner.
Kimball, Peter C. and Kimball, John H.	New Bedford,	Traders,	" 23,	J. H. W. Page.
Knights, Samuel C.	Boston,	Gentleman,	" 26,	Bradford Sumner.
Lawton, James,	Easton,	Cordwainer,	" 2,	Horatio Pratt.
Le Baron, James, 2d,	Rochester,	Laborer,	" 22,	Z. Eddy.
Lingham, Milo,	Quincy,	Stone Cutter,	" 12,	Sherman Leland.
Locke, Franklin B.	Boston,	Merchant,	" 29,	Bradford Sumner.
Loomis, H. A. et al.	Boston,	Trader,	" 12,	Bradford Sumner.
Mason, John R.	Methuen,	Carpenter,	" 21,	James H. Duncan.
Mayo, Hezekiah,	Chatham,	Trader,	" 5,	Zena Scudder.
McCall, John,	Fall River,	Trader,	" 2,	C. J. Holmes.
Merrifield, V. S.	Dedham,	Math'l Instr't Maker,	" 31,	Sherman Leland.
Mills, William H. et al.	Lynn,	Housewright,	" 21,	John G. King.
Moore, Emery N.	Boston,		" 10,	Bradford Sumner.
Morse, Hiram A.	Holliston,	Trader,	Nov. 14,	S. P. P. Fay.
Mowry, Gideon,	Uxbridge,	Yeoman,	Dec. 8,	Henry Chapin.
Munroe, Dennis, Jr.	Woburn,	Tailor,	Aug. 25,	S. P. P. Fay.
Needham, James,	Dorchester,	Laborer,	Dec. 15,	Nath'l F. Safford.
Needham Henry,	Dorchester,	Laborer,	" 15,	Nath'l F. Safford.
Newhale, Albert,	Milford,	Mason,	" 8,	Isaac Davis.
Oakes, Nathan,	Malden,	Laborer,	" 3,	George W. Warren.
Owen, John,	Cambridge,	Bookseller,	" 22,	S. P. P. Fay.
Page, John C. et al.	Danvers,	Trader,	" 26,	John G. King.
Parshley, John,	Springfield,	Trader,	" 4,	Oliver B. Morris.
Pearson, Serrale,	Boston,	Upholsterer,	" 5,	George S. Hillard.
Perry, Otis,	Natick,	Cordwainer,	Nov. 20,	Josiah Adams.
Phillips, Antone,	Sutton,	Cordwainer.	Dec. 8,	Isaac Davis.
Pierce, Parker H. Jr.	Roxbury,	Merchant,	" 1,	Sherman Leland.
Pierce, David R.	Taunton,	Trader,	" 7,	E. P. Hathaway.
Pond, Otis N. and Pond, Jonathan	Fitchburg,	Traders,	" 19,	Charles Mason.
Powers, James,	Fall River,	Laborer,	" 25,	C. J. Holmes.
Rand, Nahum,	Roxbury,	Stone Mason,	" 8,	Sherman Leland.
Randall, James J.	Framingham,	Cordwainer,	Nov. 4,	S. P. P. Fay.
Raynor, Thomas L.	Boston,	Slater,	Dec. 17,	Bradford Sumner.
Ricker, Reuben,	Quincy,	Stone Cutter,	" 8,	Sherman Leland.
Rollins, Nicholas F.	Boston,	Housewright,	" 18,	George S. Hillard.
Sabin, William,	Boston,	Hair Dresser,	" 17,	Bradford Sumner.
Sanborn, John N.	Reading,	Laborer,	" 5,	George W. Warren.
Sargent, Ebenezer,	Lowell,	Laborer,	" 7,	Josiah G. Abbott.
Shattuck, Luther,	Milton,	Stone Cutter,	" 11,	Sherman Leland.
Silverman, Sion,	Boston,	Trader,	" 3,	Bradford Sumner.
Slocum, Samuel,	Millbury,	Trader,	" 25,	Chas. W. Hartshorn,
Smallwood, Thomas,	Newton,	Furniture Dealer,	" 3,	S. P. P. Fay.
Smith, Isaacus C. et al.	Boston,	Merchant,	" 14,	George S. Hillard.
Snow, Stephen,	Canton,	Housewright,	June 15,	James Richardson.
Southgate, Samuel,	New Bedford,	Trader,	Dec. 30,	Oliver Prescott.
Sprague, George W.	Adams,	Trader,	" 8,	Franklin O. Sayles.
Swazey, Benjamin B.	Salem,	Mariner,	" 15,	John G. King.
Symonds, Fenton,	Salem,	Painter,	" 18,	David Roberts.
Thayer, Daniel T.	Blackstone,	Trader,	" 8,	Henry Chapin.
Thayer, William,	Braintree,	Yeoman,	" 19,	Sherman Leland.
Thompson, William H.	Newbury,	Innholder,	" 23,	E. Moseley.
Tucker, Hamett C.	Salem,	Ice Dealer,	" 25,	David Roberts.
Underwood, John C.	Quincy,	Stone Cutter,	" 19,	Sherman Leland.
Varney, George C.	Salem,	Trader,	" 22,	John G. King.
Ware, William,	Boston,	Painter,	" 23,	Bradford Sumner.
Warfield, John,	Franklin,	Yeoman,	May 11,	James Richardson.
Washburn, Charles P.	Fairhaven,	Shipwright,	Dec. 12,	John H. W. Page.
Wedge, John L.	Worcester,	Painter,	" 2,	Chas. W. Hartshorn.
Wentworth, George,	Boston,	Carpenter,	" 3,	Bradford Sumner.
Wentworth, Oliver,	Lowell,	Carpenter,	Nov. 25,	Josiah G. Abbott.
Wetherbee, Pliney,	Stow,	Yeoman,	Dec. 10,	Nathan Brooks.
White, Joseph F.	Boston,	Apothecary,	" 14,	Bradford Sumner.
White, Jerome T. et al.	Boston,	Printers,	" 16,	George S. Hillard.
Whitney, Aaron,	Harvard,	Gentleman,	" 30,	Chas. W. Hartshorn.
Whulum, William,	Fall River.	Laborer,	" 24,	Charles J. Holmes.
Wilmarth, Elias F.	Boston,	Machinist,	" 15,	George S. Hillard.
Wood, Harrison H.	Boston,	Carpenter,	" 14,	Bradford Sumner.
Wood, Michael,	Boston,	Marble Manufacturer.	" 23,	Bradford Sumner.
Wood, Charles A.	Boston,	Druggist, [Worker,	" 23,	Ellis Gray Loring.
Wornell, Tracy C.	Wareham,	Tin and Sheet Iron	" 21,	Zech. Eddy.
Wright, Thomas et al.	Boston,	Tin Plate Workers,	" 8,	Bradford Sumner,
Wright, Janus,	Brookline,	Mason,	" 16,	David A. Simmons.
Wright, Horace et al.	Northampton,	Tanner,	" 28,	Ithamar Conkey.